IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1344

RICHARD A. SCARBOROUGH, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

RICHARD A. SCARBOROUGH, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Richard A. Scarborough, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to reverse its decision affirming the judgment of the United States District Court for the Eastern District of Virginia, Alexandria Division.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is as yet unreported but is appended hereto (See, Appendix, page 1a).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 29, 1976 in *United States* v. *Richard A. Scarborough,* No. 74-1193. The final judgment of conviction in the United States District Court for the Eastern District of Virginia, Alexandria Division, was entered on November 30, 1973 in *United States* v. *Richard A. Scarborough,* Cr. No. 240-73-A. On February 26, 1976, an extension of time in which to file the instant Petition for Writ of Certiorari was granted upon application to Chief Justice Warren E. Burger, Circuit Justice for the Fourth Circuit. Said extension was granted to and including March 19, 1976. This Petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction of the Court of first instance was under 18 U.S.C. §3231.

QUESTIONS PRESENTED

I. Whether the Court erred in holding that a conviction under 18 U.S.C. App. § 1202(a) for possession of a firearm in commerce or affecting commerce by a convicted felon is sustainable merely upon a showing that the possessed firearm has previously at any time however remote travelled in interstate commerce.

II. Whether the Court erred in refusing to suppress the use at trial of firearms seized from petitioner's home, when those firearms were seized by a federal agent who was present looking for firearms, had no probable cause to believe that firearms were present, and was in petitioner's home without a warrant.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Title 18 U.S.C. App. §1202(a) provides in pertinent part:

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . .

* * *

and who receives, possesses or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined no more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

On January 20, 1972, Mr. Scarborough entered a plea of guilty to a felony charge in the Circuit Court of Fairfax County, Commonwealth of Virginia. Subsequently, on August 1, 1973, petitioner was arrested, by a county policeman, on a state narcotics charge, who then obtained a search warrant for the sole purpose of seizing any controlled substance that might be found in Scarborough's home.

Armed with this warrant, several Fairfax County policemen proceeded to make a search of Scarborough's home. Accompanying them was William H. Seals, a Special Agent with the United States Treasury Department Bureau of Alcohol, Tobacco and Firearms, who came to search for and thereupon seized four weapons.

Scarborough was subsequently charged in a one count indictment alleging receipt and possession of the four firearms in violation of 18 U.S.C. App. § 1202(a).

On October 5, 1973, petitioner moved to suppress the use at trial of those weapons, which had been seized without proper warrants. The motion was denied in part, and later denied in full on October 12, after further argument.

The testimony of the Treasury agent revealed that he was investigating Scarborough for violations related to firearms and that he believed him to be in possession of firearms in violation of federal law. He accompanied the county policemen in their search because he believed that firearms might be present at Scarborough's home. Nevertheless, the agent candidly admitted that he did not have enough information to obtain his own independent federal search warrant for firearms. He also admitted that he participated in the search of Scarborough's home. In fact, during the preliminary hearing the presiding magistrate made a finding that "Mr. Seals [the Treasury agent] was there as a representative of the United States Government, and Mr. Seals obviously was looking for firearms."

Four weapons were eventually found within the Scarborough residence, which was lived in jointly by the petitioner and his wife. While the agent testified at the suppression hearing that the guns were initially found by a county policeman and then turned over to him, he had previously testified at the preliminary hearing that he had been the one to seize the first two guns, and that he had been the one to find the second two. In any event, it was uncontroverted that the Treasury agent took possession of all four guns at the house, examined and unloaded each, and removed them from the house at the conclusion of the search. He made this

seizure without a warrant because it would have been a "very large inconvenience" to get one.

On October 23, 1973, a jury trial was held before the Honorable Albert V. Bryan, Jr., District Court Judge for the Eastern District of Virginia, Alexandria Division.[1]

At trial, it was adduced that Scarborough had entered a guilty plea to a felony charge on January 20, 1972 in the Circuit Court of Fairfax County, Commonwealth of Virginia. Numerous witnesses were called in an attempt to establish that the seized weapons had travelled in and affected interstate commerce. However, with regard to all four weapons, the proof uniformly established only movement or affect on interstate commerce *prior* to January 20, 1972, the date upon which the petitioner became a convicted felon. The Universal Firearm was shown to have been shipped on May 21, 1969; the Colt Cobra was shown to have been shipped in August, 1969; the M-1 rifle was shipped in 1966; and the fourth weapon was shown only to have been manufactured in France at an uncertain time prior to World War II.

Because no evidence was introduced showing that these guns had moved in or affected interstate commerce at any time after his conviction, counsel for petitioner moved for a judgment of acquittal at the close of the government's case. The Court then dismissed that part of the indictment alleging "receipt" stating that it didn't think there was any evidence of receipt of any weapon after the felony conviction. The case concerning possession however, continued. The Court later denied a proffered instruction concerning the required nexus between possession and commerce containing in pertinent part:

---

[1] Jurisdiction was conferred by 18 U.S.C. § 3231, *supra*.

> In order for the defendant to be found guilty of the crime with which he is charged, it is incumbent upon the Government to demonstrate a nexus between the "possession" of the firearms and interstate commerce. For example, a person "possesses" in commerce or affecting commerce if at the time of the offense the firearms were moving interstate or on an interstate facility, or if the "possession" affected commerce. It is not enough that the Government merely show that the firearms at sometime had travelled in interstate commerce . . . .

This instruction was based on this Court's opinion in *United States* v. *Bass,* 404 U.S. 336, 350 (1971).

Thereafter, on October 24, 1973, Scarborough was found guilty of possession in commerce or affecting commerce four firearms, having previously been convicted of a felony. On November 30, 1973, petitioner was sentenced to confinement for a period of one year, said sentence to run consecutively with any current sentence.

On January 29, 1976, the United States Court of Appeals for the Fourth Circuit affirmed the conviction holding in effect that mere possession of firearms that have previously travelled in interstate commerce provides a sufficient nexus between that possession and commerce so as to support a conviction under 18 U.S.C. App. § 1202(a) regardless of whether the firearms found their way into the possession of an individual before having been convicted of a felony.

REASONS FOR GRANTING THE WRIT

The fundamental question in this case is whether the required nexus between possession of a firearm by a convicted felon and the effect of such possession upon

interstate commerce is satisfied merely upon a showing that the possessed firearm has previously travelled in interstate commerce. In deciding this question in the affirmative, the Fourth Circuit stands squarely at odds with several other circuits. Moreover, in refusing to draw a distinction between the requisite nexi to commerce that must be shown to establish possession as opposed to receipt, the Fourth Circuit stands in conflict with a plurality of the members of this Honorable Court in *United States* v. *Bass,* 404 U.S. 336, 350 (1971). Action by this Court is necessary to achieve uniformity in the application of 18 U.S.C. App. § 1202(a).

I. THE COURT ERRED IN HOLDING THAT A CONVICTION UNDER 18 U.S.C. APP. § 1202(a) FOR POSSESSION OF A FIREARM IN COMMERCE OR AFFECTING COMMERCE BY A CONVICTED FELON IS SUSTAINABLE MERELY UPON A SHOWING THAT THE POSSESSED FIREARM HAS PREVIOUSLY AT ANY TIME HOWEVER REMOTE TRAVELLED IN INTERSTATE COMMERCE.

In *Bass, supra,* the Court held that under 18 U.S.C. App. §1202(a) a nexus to interstate commerce must be shown with respect to a convicted felon receiving, transporting or possessing a firearm, 404 U.S. at 347. Since the government failed to introduce any evidence at trial demonstrating an affect upon commerce, Bass' conviction was reversed.

In the instant matter, the firearms in question had been received by petitioner prior to his state felony conviction in 1972. For this reason, the District Court dismissed the receipt charges under § 1202(a) recognizing that federal jurisdiction is contingent upon receipt in or affecting commerce *subsequent* to a felony con-

viction. Petitioner possessed the firearms prior to his state felony conviction; he did not move the firearms in interstate commerce nor in any way exercise his possession so as to affect interstate commerce.

The Court clearly stated in *Bass* that "we do not interpret § 1202(a) to reach the 'mere possession' of firearms." 404 U.S. at 350.

In Part III of the *Bass* opinion, Mr. Justice Marshall, joined by Justices White, Stewart and Douglas, discussed the necessary interstate nexus that must be shown with respect to the "possession" and "receipt" offenses:

> The Government can obviously meet its burden in a variety of ways. We note only some of these. For example, a person 'possesses . . . in commerce or affecting commerce' if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce. *Significantly broader in reach, however, is the offense of 'receiv[ing]* . . . in commrce or affecting commerce,' for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce.
>
> 404 U.S. at 350 (emphasis added)

Thus, to prove the offense of "receiving," it is enough that the government prove the firearm has previously travelled in interstate commerce; to prove the offense of possessing," however, an affect upon commerce must be shown to be contemporaneous with the possession. This construction was adopted by the Second Circuit in *United States* v. *Bell*, 524 F.2d 202 (2nd Cir. 1975), in which the Court recognized:

> The message seems clear—a contemporaneous interstate nexus is necessary for a possession conviction but interstate transportation at some *prior* point suffices where the offense charged is receipt of a weapon.
>
> *Id.* at 205.

This view has been expressly followed by the Second, Eighth and Ninth Circuits. *See, e.g., United States* v. *Bell, supra; United States* v. *Steeves*, 525 F.2d 33, 38-39 (8th Cir., 1975); *United States* v. *Kelly*, 519 F.2d 251, 252 (8th Cir., 1975) *cert. denied* —— U.S. ——, 44 U.S.LW. 3263 (11/3/75); *United States* v. *Cassity*, 509 F.2d 682 (9th Cir., 1974). Additional support may be found in the Fifth and Seventh Circuits. *See, e.g., United States* v. *Goodie*, 524 F.2d 515, 516-517 (5th Cir., 1975); *United States* v. *Walker*, 489 F.2d 1353, 1357-1358 (7th Cir., 1973) (Stevens, J.) *cert. denied* 415 U.S. 982 (1974). In *Walker*, speaking of the distinction drawn in *Bass*, Judge, now Justice, Stevens stated:

> Similarly, the Court expressly stated that the receipt offense is 'significantly broader in reach' than the possession offense *Id.* at 350, 92 S.Ct. 515. Apparently possession is not proscribed unless the gun is 'moving interstate or on an interstate facility, or if the possession affects commerce.' *Id.* at 350, 92 S.Ct. at 524.
>
> 489 F.2d at 1357.

The Fourth Circuit stands alone in refusing to recognize the distinction drawn in *Bass*. Cases cited by the Fourth Circuit in support of its position, *e.g.*, *United States* v. *Bush*, 500 F.2d 19 (6th Cir., 1974); *United States* v. *Day*, 476 F.2d 562 (6th Cir., 1973); *United States* v. *Brown*, 472 F.2d 1181 (6th Cir., 1973);

United States v. *Haley,* 500 F.2d 302 (8th Cir., 1974) (see Appendix, Page 5a at n. 8) all involve conviction for either "receipt" or "receipt and possession." There is no question that Courts of Appeal have held that proof of the firearm's prior travel in commerce suffices where the broader offense of "receipt" is charged. This is also true when "receipt and possession" is charged because where a verdict of guilty results upon charges specified in the conjunctive, the verdict is valid if the proof supports either of the charges. *Crain* v. *United States,* 162 U.S. 625 (1895); *Turner* v. *United States,* 396 U.S. 398 (1970) and cases cited therein. In *Turner,* the Court declared:

> The general rule is that when a jury returns a verdict of guilty on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.
>
> *Id.* at 420.

In the instant case, petitioner was convicted only for "possession" and since the government failed to proffer any evidence establishing an effect upon commerce contemporaneous with and as a result of such possession, it failed to meet the legal burden outlined in *Bass.* In view of the great number of cases arising under 18 U.S.C. App. § 1202(a) and the conflict among the Circuits, petitioner prays that the question at issue be settled in conformity with the distinction drawn in *Bass.*

II. THE COURT ERRED IN REFUSING TO SUPPRESS THE USE AT TRIAL OF FIREARMS SEIZED FROM PETITIONER'S HOME, WHEN THOSE FIREARMS WERE SEIZED BY A FEDERAL AGENT WHO WAS PRESENT LOOKING FOR FIREARMS, WITHOUT PROBABLE CAUSE TO BELIEVE THAT FIREARMS WERE PRESENT, AND WHO WAS IN PETITIONER'S HOME WITHOUT A WARRANT.

As set forth in the Statement of the Case, *supra,* Agent Seals was conducting a search on his own, with an object separate and apart from that of his companion state policemen. Moreover, Seals admitted having no independent probable cause for his search. The resulting seizure of guns from the petitioner's home was thus unconstitutional.

In *Byars* v. *United States,* 273 U.S. 28 (1927), state police, pursuant to a state warrant authorizing a search for intoxicating beverages and related materials, sought the assistance of a Federal Prohibition Agent who accompanied the state officers. The search uncovered certain strip stamps of the kind used on bonded whiskey bottles, the possession of which was a federal offense. Finding the search to be a federal search, the Court stated:

> The attendant facts here reasonably suggest that the federal prohibition agent was not invited to join the state squad as a private person may have been, but was asked to participate as a federal enforcement officer, upon the chance, which was subsequently realized, that something would be disclosed of official interest to him as such agent.

273 U.S. at 32. *See, Navarro* v. *United States,* 400 F.2d 315 (5th Cir., 1968); *Lustig* v. *United States,* 338 U.S. 74 (1949).

In the present case, the objects sought by each sovereign were distinctly different. The state agents sought narcotics. The federal agent, however, was present for the purpose of discovering firearms. His seizure of those weapons must stand and be examined by itself, and cannot come within the purview of the state warrant. While it is true that police lawfully present may seize evidence of a crime which is in their plain view, Agent Seals was differently situated. He cannot be considered, as the government contends, an invitee of the state officers. He had entered petitioner's home for distinct purposes, purposes not within the warrant which brought the others there. Since he had no probable cause to search for weapons, he cannot be considered "lawfully" on the premises. The plain view exception is thus not available to him. *Harris* v. *United States,* 390 U.S. 23 (1968) (*per curiam*). His examination and seizure and carrying away of the guns was thus invalid under the Fourth Amendment.

Similarly, in *United States* v. *Sanchez,* 509 F.2d 886 (6th Cir., 1975), the Court ruled that seizure of explosives by an agent of the Bureau of Alcohol, Tobacco and Firearms was illegal where he accompanied state police pursuant to a state warrant authorizing a search for narcotics. The Court explained:

> An essential requirement is that the police officer must have a right to be in the position from which he is able to view the property. *Harris* v. *United States,* 390 U.S. 234 . . . (1968) (*per curiam*). Standing alone, the existence of a "plain view" is insufficient to justify application of the plain view exception. *Coolidge,* [v. *New Hampshire,* 403 U.S. 443 (1971)] 403 U.S. at 468. The government contends that its agent was rightfully on the premises because he had accompanied local police at

> their request when they had executed a valid narcotics search warrant. We find this argument unpersuasive. We believe that the warrant authorized only the local officers to enter and search the Sanchez property for narcotics. It could not be used to validate the entrance of a federal officer having both probable cause and the opportunity to obtain a separate warrant to search for different items of property. *Byars* v. *United States,* 273 U.S. 28 (1927) [citation omitted].
>
> On the facts of this case, there were two simultaneous but disinct intrusions, each conducted by separate agencies for the purpose of securing different types of property. Each search had to be authorized independently by a separate warrant unless the warrant requirement was excused by a valid exception.
>
> 509 F.2d at 889.

The same is true of the present case. The federal government cannot be permitted to have Seals enter the petitioner's home under the authority of a state warrant for narcotics, when his true purpose was to find firearms. Although there is conflict in the testimony as to whether or not he discovered the weapons first, it is undisputed that he examined them at the scene, and that he seized them and carried them away, all without a warrant. Nor can the explanation that his presence as an expert was required in case guns were found excuse the improper search and seizure here. The same claim was made in *Sanchez, supra,* 509 F.2d at 888, n. 1. It is respectfully submitted that this warrantless search and seizure was improper and that the decision below, in conflict with Fourth Amendment principles and the decision of the Court of Appeals for the Sixth Circuit, warrants consideration by this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1193

UNITED STATES OF AMERICA, *Appellee,*

–versus–

RICHARD A. SCARBOROUGH, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Disrtict Court.

Argued: November 14, 1975. Decided: Jan. 29, 1976

Before BOREMAN, Senior Circuit Judge, and RUSSELL and FIELD, Circuit Judges.

• • •

RUSSELL, CIRCUIT JUDGE:

Richard A. Scarborough was convicted of possessing firearms after a previous conviction of a felony in violation of 18 U.S.C. App. § 1202(a)(1). Defendant contends on appeal that: (1) the government failed to establish a nexus between his possession of the firearms and interstate commerce; (2) seizure of the weapons was not pursuant to a proper warrant, (3) the Court failed to instruct the jury that "knowing and intentional possession" may not be presumed from the discovery of objects within a person's dwelling; and (4) delay in the preparation of the trial transcript prejudiced the defendant and denied him due process of law. We affirm.

Scarborough was convicted of a felony in State Court in 1972.[1] On the morning of August 1, 1973, he was arrested by State officers while leaving his house and he had on his

[1] He was convicted of possession with intent to distribute narcotics.

person at the time some 287 doses of LSD. A State search warrant, supported by ample probable cause, was obtained.[2] The police requested an AFT agent to accompany them during the search of the defendant's house.[3] The police discovered four firearms in defendant's bedroom.[4] These were turned over to the ATF agent for unloading (three were loaded), after which they were seized. Defendant was charged with "receiving and possessing" the firearms. At the close of the Government's case, the Court granted defendant's motion for a judgment of acquittal on the part of the indictment alleging "receipt," stating "I don't think

[2] The search warrant was issued pursuant to a sworn affidavit of a State investigator setting forth the following facts: That he had received from a confidential informant information that Richard Scarborough was selling illegal drugs from his home; that the informant had himself purchased illegal drugs from Scarborough on numerous occasions during the "last six months;" that on July 16, 1973, the confidential informant and an undercover agent went to Scarborough's home where the undercover agent observed the confidential informant purchase $125 worth of LSD; the undercover agent had a conversation on the night of July 16, 1973, with Scarborough concerning other illegal drugs which Scarborough said he had in his possession; she observed a container which Scarborough said contained part of his "stash;" also the undercover agent observed numerous illegal pills and suspected marijuana referred to by Scarborough as "Columbian;" and finally the affidavit related the arrest of Scarborough on the State distribution warrant, and the finding of the additional LSD and the suspected phencyclidine on Scarborough's person.

[3] The local police had been informed that Scarborough carried a weapon and they wished the ATF agent to accompany them to be present during the arrest, and as an adviser since he had particular qualifications as a firearms expert.

[4] A colt Cobra 2-inch revolver was found in a nightstand or bureau drawer close to the bed in the master bedroom; a French revolver (St. Etienne) was found in the bedroom; a Universal Arms Company Enforcer .30 caliber and a .30 Caliber U. S. M-1 carbine were found under the bed. All of the weapons were loaded except the French revolver.

there is any evidence of receipt of any weapon after he was a convicted felon." The conviction accordingly rests entirely on possession of the firearms.

There is no dispute that each weapon had previously traveled in interstate commerce.[5]

Consistently since the enactment of the gun control legislation incorporated in the Omnibus Crime Control and Safe Streets Act of 1968, this Circuit has sustained convictions under that statute,[6] where the interstate commerce nexus requirement of the possession offense under the statute was supported by proof that the possessed firearm had previously traveled in interstate commerce. We find nothing in *United States* v. *Bass* (1971) 404 U.S. 336, to compel any change in this ruling and we have since that decision continued to employ the same test for the offense of possession under § 1202(a) as before.

In a recent decision, however, the Second Circuit concluded that *Bass* requires that any conviction for possession under 1202(a) must be supported by proof that possession was contemporaneous with interstate commerce movement. *United States* v. *Bell* (2d Cir. 1975) — F.2d — (decided October 6, 1975). It reaches this result by finding that the Court in *Bass* made a distinction between the offenses of *receipt* and *possession* under the statute and that, while contemporaneous interstate commerce move-

[5] The undisputed evidence showed that the .30 inch caliber Enforcer was manufactured in Florida and shipped from Florida to Virginia, that in 1973, a year after Scarborough had been convicted of a felony, there was ordered from the Florida company on two occasions parts for the Enforcer; the Colt Cobra revolver was manufactured in Connecticut and the totally assembled revolver was shipped from Connecticut to North Carolina; the M-1 carbine was shipped from Illinois to Maryland, and the St. Etienne French revolver was manufactured in France during the nineteenth century.

[6] 18 U.S.C. App. § 1202(a).

ment was not mandated for the offense of *receipt* it was so mandated for *possession*. A careful reading of the statute itself, in our judgment does not support this result nor do we perceive in *Bass* any language that compels this construction of the statute. The Court in *Bass* was not, in our opinion, fixing precise criteria for establishing the degree of proof of interstate commerce movement required under the statute for the offenses of *receipt* and *possession*. This is plain from the language of the Court to the effect that "[T]he Government can obviously meet its burden [of proving interstate movement] in a variety of ways" under the statute and observed that it was noting "only some of these."[7] We are of the opinion that the Congressional purpose as expressed in the statute itself was that it was only necessary to establish that the firearm had previously traveled in interstate commerce to make out the offense whether of possession or of receipt and that *Bass* did not hold otherwise.

We find the language of Judge Young in *United States* v. *Snell* (D.Md. 1973) 353 F. Supp. 280, 284, convincing. He said:

> * * * And if Congress did wish to establish a different interstate nexus for possession than for receipt, it could easily have resorted to the explicit language of other statutes by which it made it clear that the offense was to be limited to transactions contemporaneous with interstate transportation. E.g. the offense of receipt of stolen goods, 18 U.S.C. §§ 2314-2317, is limited to receiving goods "moving as, or which are a part of, or which constitute" interstate commerce.
>
> What is not understandable is that possession should be treated any differently from receipt. A construction of Section 1202(a) that would read a different interstate commerce nexus into "possession . . . in commerce or affecting commerce" and "receives . . . in commerce or affecting commerce" would create,

[7] 404 U.S. at 350.

> rather than resolve, ambiguity. A differing approach to the two parallel phrases thus seems inconsistent with the thrust of the *Bass* decision.
>
> This analysis of Part III of the opinion in United States v. Bass indicates that the Supreme Court did not intend its language therein to substitute for the sort of statutory construction of Section 1202(a) which has lead this Court to conclude that the possession offense is not limited to possession while the firearm is in the stream of commerce.

We accordingly see no reason to recede from our former opinion that the offense of possession under the statute compels only proof that the firearm has previously traveled in interstate commerce.[8]

Defendant next argues that it was error not to suppress the weapons seized since there was no federal warrant. However, the record shows that this was a lawful search under a valid State warrant. Therefore, the Court below was correct in admitting the weapons into evidence.[9] The evidence also indicates that there were several people on the premises being searched, thus raising the danger that the weapons might be removed if the ATF agent left to obtain a federal warrant. As we said in *Anglin* v. *Director* (4th

[8] *United States* v. *Smothers* (4th Cir. 1974) — F.2d —; *United States* v. *Davis* (4th Cir. 1974) — F.2d —; *United States* v. *Kline* (4th Cir. 1974) — F.2d —; *United States* v. *Jordan* (4th Cir. 1974) 502 F.2d 1163; *United States* v. *Mullins* (4th Cir. 1973) 476 F.2d 664. This view has been followed by other circuits: *United States* v. *Busch* (6th Cir. 1974) 500 F.2d 19, 21; *United States* v. *Day*, (6th Cir. 1973) 476 F.2d 562, 569; *United States* v. *Brown* (6th Cir. 1973) 472 F.2d 1181, 1182; *United States* v. *Haley* (8th Cir. 1974) 500 F.2d 302, 304; *United States* v. *Lupino* (8th Cir. 1973) 480 F.2d 720, 723-4, *cert. denied* 414 U.S. 924 (1973). *Contra, United States* v. *Cassity* (9th Cir. 1974) 509 F.2d 682, 683.

See, also, *Barrett* v. *United States* (1975) — U.S. —, 18 CrL. 3033, decided January 13, 1976.

[9] *See, United States* v. *Johnson* (4th Cir. 1971) 451 F.2d 1321, 1322, *cert. denied* 405 U.S. 1018 (1972).

Cir. 1971) 439 F.2d 1342, 1347, *cert. denied* 404 U.S. 946 (1971); "[O]nce the privacy of the dwelling has been lawfully invaded, it is senseless to require police to obtain an additional warrant to seize items they have discovered in the process of a lawful search."

We find no merit in defendant's contention that the Court failed properly to instruct the jury on the matter of possession. In fact, the Court instructed the jury that mere knowledge was not sufficient, but that possession depended on the defendant's "control and dominion" over the weapons. Evidence of the defendant's "control and dominion" over the weapons was quite sufficient to support the verdict.[10]

We find defendant's remaining ground without merit. He was not prejudiced by the delay in the transmittal of the transcript of his trial.

The conviction is accordingly affirmed.

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[10] Two of the weapons were under the bed, and the other two were in drawers less than five feet from the bed. Three of the weapons were loaded.

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1344

RICHARD A. SCARBOROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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PETITION FOR CERTIORARI FILED MARCH 17, 1976
CERTIORARI GRANTED OCTOBER 4, 1976

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IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL
	)	NO. 240-73
RICHARD A. SCARBOROUGH	)	

SEPTEMBER 1973 TERM—At Norfolk

THE GRAND JURY CHARGES:

That on or about August 1, 1973 at Fairfax County, Virginia in the Eastern District of Virginia, RICHARD A. SCARBOROUGH, having previously been convicted in 1972 of felonies in the Circuit Court of Fairfax County, Virginia, to wit: possession of a controlled drug with intent to distribute, unlawfully and knowingly did receive and possess in commerce and affecting commerce four firearms, that is, a Colt Cobra .38 caliber six shot revolver, serial number A67899; a Universal Arms Company .30 caliber Enforcer, serial number 161734; a .30 caliber United States M-1 Carbine, serial number 4794909; and a Model 1873, St. Etienne French Ordinance Revolver with serial number obliterated.

(Violation of Title 18, Appendix, United States Code, Section 1202(a)

A TRUE BILL:

FOREMAN

IN THE
CIRCUIT COURT OF FAIRFAX
COUNTY VIRGINIA

COMMONWEALTH OF VIRGINIA	)	
	)	Indictment–
vs.	)	Possession of a
	)	controlled drug
RICHARD A. SCARBOROUGH	)	with intent to
	)	distribute
	)	# 17294

This 8th day of September, 1972, came the Commonwealth, by her Attorney, and the Defendant, RICHARD A. SCARBOROUGH, who stands convicted of a felony, to-wit: possession of a controlled drug with intent to distribute, appeared agreeably in accordance with his recognizance of bail; also appeared Philip J. Hirschkop, Counsel for the said Defendant.

Thereupon, the Court Reporter was sworn.

Whereupon, the Defendant moved the Court to permit him to withdraw his former plea of guilty and enter a plea of not guilty and which motion the Court, after hearing argument thereon, denied.

Whereupon, the Defendant moved the Court to reduce the sentence heretofore imposed in this case on August 18, 1972, and which motion the Court granted. It is, therefore, ORDERED that the sentence of eight (8) years with five (5) years suspended heretofore imposed in this case be and the same is hereby vacated.

And nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that RICHARD A. SCARBOROUGH do serve one (1) year in the Penitentiary House of this Commonwealth; but in mitiga-

tion of punishment, it appearing compatible with the public interest so to do, the Court does now suspend the serving of the said sentence, conditioned upon the Defendant's good behavior and that he shall be on active probation subject to the conditions set forth in P. B. Form 2 Revised 6-71 for a period of one (1) year.

Whereupon, the Attorney for the Defendant advised the Court that it was the Defendant's desire at this time to withdraw the appeal formerly noted in this case.

The bond in this case heretofore continued for the purpose of appeal is hereby discharged and the Defendant is released on the conditions of the aforesaid probation.

/s/James C. Cacheris
Judge

IN THE
CIRCUIT COURT OF
FAIRFAX COUNTY, VIRGINIA

COMMONWEALTH OF VIRGINIA	)	
	)	Indictment–
vs.	)	Possession of a
	)	controlled drug
RICHARD A. SCARBOROUGH	)	with intent to
	)	distribute
	)	# 17295

This 8th day of September, 1972, came the Commonwealth by her Attorney, and the Defendant, RICHARD A. SCARBOROUGH, who stands convicted of a felony, to-wit: possession of a controlled drug with intent to

distribute, appeared agreeably in accordance with his recognizance of bail; also appeared Philip J. Hirschkop, Counsel for the said Defendant.

Thereupon, the Court Reporter was sworn.

Whereupon, the Defendant moved the Court to permit him to withdraw his former plea of guilty and enter a plea of not guilty and which motion the Court, after hearing argument thereon, denied.

Whereupon, the Defendant moved the Court to reduce the sentence heretofore imposed in this case on August 18, 1972, and which motion the Court granted. It is, therefore, ORDERED that the sentence of eight (8) years with five (5) years suspended heretofore imposed in this case be and the same is hereby vacated.

And nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that RICHARD A. SCARBOROUGH do serve six (6) years in the Penitentiary House of this Commonwealth, at hard labor; but in mitigation of punishment, it appearing compatible with the public interest so to do, the Court does now suspend the serving of the said sentence, conditioned upon the Defendant's good behavior and that he shall be on active probation subject to the conditions set forth in P. B. Form 2 Revised 5-71 for a period of six (6) years. The sentence and probationary period imposed in this case shall run concurrently with the sentence and probation imposed in case numbered 17294.

Whereupon, the attorney for the Defendant advised the Court that it was the Defendant's desire at this time to withdraw the appeal formerly noted in this case.

The bond in this case heretofore continued for the purpose of appeal is hereby discharged and the Defendant is released on the conditions of the aforesaid probation.

/s/James C. Cacharis
Judge

DISTRICT COURT–GOVERNMENT'S ANSWER TO DEFENDANT'S MOTION FOR BILL OF PARTICULARS [Paragraph 5] –October 5, 1973

* * *

5. With respect to paragraph 5 of the defendant's Motion, the possession of the four weapons by defendant on August 1, 1973 at 2145 Pimmit Drive, Falls Church, Fairfax County, Virginia, affected commerce since the weapons had previously traveled in commerce as follows:

(a) Colt Cobra–shipped by Colt Firearms Co. from Hartford, Connecticut on May 12, 1969 to Curries Sporting Goods, Rockingham, North Carolina. The weapon ended up by unknown means in Virginia.

(b) M-1 Universal Enforcer–manufactured in Hialeah, Florida and shipped on April 30, 1969 to Carter Gun Works, Charlottesville, Virginia. Subsequently acquired by Clark Brothers Firearms, Warrenton, Virginia who sold it on March 20, 1970 to the defendant.

(c) M-1 Carbine–shipped by U.S. Army on September 2, 1966 from Rock Island, Illinois to Homer M. Brett, Chevy Chase, Maryland. By unknown means it traveled to Virginia to the possession of the defendant.

(d) Model 1873 St. Etienne French Ordinance Revolver–manufactured prior to 1892 in France, and never manufactured in the United States. The weapon moved from France by unknown means to Virginia to the possession of the defendant.

TESTIMONY OF MR. D'ARCY

* * *

[p. 54] A My name is Mr. D'Arcy. I am a customer service rep for Colt Firearms.

[p. 55-56] * * *

Q Now, does this record reflect from that that the weapon was shipped from the Colt factory in Hartford to Rockingham, North Carolina?

A Yes. Yes, it does.

Q From your records is there a way that you can tell whether that particular weapon has been received down there or just whether its been shipped?

A No, we can't tell if it has been actually received. We just know that it was shipped.

Q What was the date that particular Colt Cobra revolver was shipped, sir?

A The invoice date is 5/9/69.

Q Was that a new weapon, sir?

A Yes, it was.

Q Does Colt manufacture this weapon outside of Hartford, sir? Is this weapon manufactured outside the State of Connecticut rather?

A No. It is totally assembled within the State of Connecticut.

* * *

TESTIMONY OF TONY MARTIN

* * *

[p. 59] A Yes, sir. My name is Tony Martin. I am owner of Curries Sporting Goods in Rockingham, North Carolina.

* * *

[p. 60] Q Let me ask you, sir, were you able to state from your records whether in fact a Colt .38 caliber revolver, A 67899, in fact this weapon, if you look at the

serial number, was received by your company in Rockingham, North Carolina?

A Yes, sir, it was.

Q All right, sir. When was it received?

A It came in the store, oh, let's see the date was—one moment and I have that on the log book—on 5/15/69.

Q What was done with that weapon by your company after it was received, sir?

A It stayed in the store for two or three months until the date of eight—it's on that, I think—eight something and at that time it was given back to a Mr. Jim Lewis or James G. Lewis, who was a rep for Colt.

* * *

TESTIMONY OF MARTHA PEARSON

[133] Q Ma'am, would you please state your name and your occupation?

A Martha Pearson. I am a clerk at Clark Brothers Company.

Q Let me direct your attention back to 1970 and ask if you had occasion to sell a Universal Enforcer to one Richard A. Scarborough? Did you have occasion to sell a firearm to him?

A I did sell the firearm to him.

THE COURT: What was the date?

Q What was the date of the transaction?

A March 20, 1970.

* * *

TESTIMONY OF ROBERT SOMERSTEIN

* * *

[p. 135] Q Sir, would you please state your name and your occupation?

A My name is Robert Somerstein, and I am Vice President of Universal Firearms.

Q Where is your company located, sir?

A In Hialeah, Florida.

Q Does your company manufacture firearms in Florida, in Hialeah?

A Yes, we do.

Q Do you manufacture any arms outside of Florida—your company?

A Well, we have shotguns manufactured for us in Italy and Spain, and we import them but we manufacture only firearms ourselves in Hialeah.

* * *

[p. 136] Q Do your records reflect where—can you state from your records where the Universal Enforcer was shipped to, this particular Serial No. 161734?

A Yes, I can. It went to Carver Gun Works.

Q Where is that located, sir?

A At 2211 Jefferson Parkway and 21st, Chartersville, Virginia.

Q Is that Charlottesville?

A Charlottesville, excuse me.

Q What was the date that that weapon was shipped?

A May 21, 1969.

* * *

TESTIMONY OF MORRIS PALOS

* * *

[p. 63] A My name is Morris Palos and my occupation I am a general supply specialist, Department of the Army. I am a Department of the Army civilian and I work for the U.S. Army Command located at Rock Island, Illinois.

* * *

[p. 63-64] Q All right, sir. I would ask you if you have brought with you any existing records pertaining to a .30 caliber M-1 .30 caliber M-1 carbine with a serial No. 4794909?

A Yes, I have.

* * *

[p. 64-65] Q What is the record that you brought with you and what does it reflect, sir?

A This record is called a sales record. It is a part of the, a form that we have to indicate sale of this carbine to the individual, in this case Homer M. Brett.

Q And what is the address that reflects where Mr. Brett was when this weapon was sold to him?

A This weapon was sold to Mr. Brett in 1966 and the address at that time was 3513 Leland Street, Chevy Chase, Maryland.

Q And can you state as far as or from your records what happened to this weapon? What your shipment procedure is?

A The shipping procedure for this weapon is that once we get this form which is approved by the NRA office in Washington, the two copies of this form is mailed to the NRA member and we get the third copy. We hold the third copy in suspense. Upon receipt of the second copy which is released by the recipient or the NRA member, we then process the form for shipping instructions and in this case here, this weapon was shipped from the Oak Island Arsenal.

Q It was shipped from Oak Island Arsenal, that is in Illinois?

A Yes, in Oak Island, Illinois, sir.

* * *

TESTIMONY OF ROBERT SCROGGIE

* * *

[p. 68] A Robert Scroggie, S-c-r-o-g-g-i-e. Firearms enforcement analysis for the Alcohol, Tobacco and Firearms Bureau.

* * *

[p. 70] Q It will fire. Now that weapon, the Snatton revolver, can you tell us about this particular weapon, sir? First of all as to where it is manufactured and whether this weapon has ever been manufactured in the State of Virginia?

A The weapon was a French service weapon from 1873 up through World War Two. They ceased production along the 1880's in France, the weapon was never manufactured in the United States.

* * *

TESTIMONY OF RICHARD SCARBOROUGH

* * *

[p. 87-88] Q Mr. Scarborough, with regard to these weapons here, have you ever seen this weapon before?

A Yes, sir.

Q Did you purchase this weapon?

A Yes, sir, I did.

Q Do you recall when that was?

A Early '70.

Q This Cobra, did you purchase that weapon?

A Yes, sir, I did.

Q Where did you purchase this?

A Clark Brothers, sir.

Q This is Exhibit No. 1. Is Clark Brothers in the State of Virginia?

A Yes, sir, Warrenton.

Q Do you recall approximately when you purchased this weapon?

A The exact date, no. It was early in '70 also.

Q I asked you about the Enforcer a minute ago. This is Exhibit No. 3. Where did you purchase this weapon?

A Clark Brothers.

* * *

[p. 107-08]

Q And from where did you obtain the carbine, the M-1 carbine?

A I bought it from a private individual.

Q Who was that, sir?

A Donald Webb.

Q When was that?

A I believe sometime in '68. I don't know the exact date. It was in the summer of '68.

* * *

TESTIMONY OF WILLIAM SEALS

* * *

[p. 102-02a] Q Agent Seals, let me direct your attention to later that morning. Did you have any occasion to return to that premises?

A Yes, I did.

Q Did you have any kind of legal document with you?

A Yes, sir.

Q What was that?

A I was with Fairfax County officers who had in their possession a state search warrant to search the premises.

Q Did you in fact observe a search at that premises?

A Yes, sir, I did.

Q Were you able to personally observe any kind of weapons being found, sir?

A Yes, sir, I was.

Q Would you describe where they were found, and what they were?

A Yes, sir. The first weapon located was a .38 caliber, 2-inch revolver, Colt.

The second weapon located was another revolver of French manufacture, St. Etienne revolver.

The next two weapons located were the .30 caliber U.S. M-1 carbine, and the other weapon was a Universal Arms Company Enforcer, .30 caliber.

Q Could you describe the layout of the house, in which rooms, if any, these weapons were found?

A Yes, sir. They were located in what appeared to be the master bedroom of that residence.

* * *

DISTRICT COURT–MOTION FOR JUDGMENT OF ACQUITTAL

[p. 77] MR. HIRSCHKOP: Your Honor, at this time, we would make a motion for judgment of acquittal based on two grounds. In the case of United States versus Bass, it is the Supreme Court decision, the case there draws a distinction between the possessing and receiving of firearms.

* * *

[p. 79] THE COURT: I think the evidence is sufficient to show that they did travel in interstate commerce prior to the conviction.

* * *

[p. 80] THE COURT: I think under the Mullins case [*United States v. Mullins*, 476 F.2d 664 (4th Cir. 1973) (per curiam)] it is sufficient to go to the jury here on possession. But I think there should–the motion for judgment of acquittal should be and will be granted insofar as receipt is concerned.

DISTRICT COURT–DEFENDANT'S REFUSED INSTRUCTION

In order for the defendant to be found guilty of the crime with which he is charged, it is incumbent upon the

Government to demonstrate a nexus between the "possession" of the firearms and interstate commerce. For example, a person "possesses" in commerce or affecting commerce if at the time of the offense the firearms were moving interstate or on an interstate facility, or if the "possession" affected commerce. It is not enough that the Government merely show that the firearms at sometime had travelled in interstate commerce. Accordingly, if the Government has failed to meet the burden cast upon it to show the connection between the possession of the firearms and interstate commerce, the defendant must be found not guilty.

DISTRICT COURT CHARGES TO JURY

[p. 155-56] The indictment in this case charges that on or about August 1, 1973, at Fairfax County, Virginia, in the Eastern District of Virginia, Richard Scarsborough having previously been convicted in 1972 of a felony in the Circuit Court of Fairfax County, Virginia, to wit, possession of a controlled drug with intent to distribute, unlawfully and knowingly did receive, did possess, not receive, but did possess in commerce and affecting commerce four firearms, that is a Colt Cobra .38 chamber 6 shot revolver, a Universal Arms Company .30 caliber Enforcer, a .30 caliber United States M-1 carbine and a model L1873 St. Etienne French ordinance revolver.

Three essential elements are required to be proved to establish this offence. First, the act of possessing a firearm in commerce of affecting commerce. Second, the doing of such act knowingly and third, the doing of such act after having been convicted of a felony.

* * *

[p. 158-59] You will recall that the elements of the offense include the act of possession and says that it must be in commerce or affecting commerce. The government may meet its burden of proving a connection between commerce and the possession of a firearm by a convicted felon if it is demonstrated that the firearm possessed by a convicted felon had previously travelled in interstate commerce.

Interstate commerce is commerce between one state and another state, or the District of Columbia, and so a firearm that is sent or carried from one state to another or into another state from without that state travels in interstate commerce.

It is not necessary that the government prove that the defendant purchased the gun in some state other than that where he was found with it or that he carried it across the state line, nor must the government prove who did purchase the gun.

* * *

[p. 162-63] I would like to comment briefly on the evidence and because my comment is based on my recollection of the evidence, and since it is your recollection that counts, you are free to disregard any part or all of this comment that you desire to.

There is no doubt in fact the defendant has stipulated that he was convicted of a felony before August 1, 1973 when this offense is supposed to have taken place. And while the government must prove the connection with interstate commerce beyond a reasonable doubt, under the instruction which I gave you which allows the government to meet that burden by showing that the weapon or weapons had previously been transferred in interstate commerce, there seems to me to be not much of an issue on that score.

* * *

[p. 168] THE COURT: Members of the jury, I have your questions and I will read them for the record.

The first one is: If Mr. Scarborough merely knew the guns were in the house, is he guilty of this crime?

* * *

[p. 169-70] The other question is: Can he own a gun if made and purchased in the State of residence?

Ownership of the gun is not the requirement of its possession, not ownership that is the test and it is not necessarily where purchased.

The government may meet its burden of proving a connection between commerce and the possession of a firearm by a convicted felon if it is demonstrated that the firearm possessed by a convicted felon had previously travelled in interstate commerce. It is not necessary that the government prove that the defendant purchased the gun in some state other than where he was found with it, or that he carried it across the state line, nor must the government prove who did purchase the gun.

What I have given you is an abbreviated or shortened form of the total charge. You should consider all the other instructions of the Court and you must remember always, of course, that no defendant can be convicted unless all of the elements of the offense including possession, constructive or otherwise, and including its connection with interstate commerce has been proved beyond a reasonable doubt.

* * *

[p. 171-72] THE COURT: The counsel have indicated that perhaps I didn't adequately or completely answer your second question.

Can he own a gun if made and purchased in the State of residence? If the gun were manufactured in Virginia, and that was his state of residence, and if it were purchased in Virginia and had no connection with

interstate commerce, then there would be no offense because the offense here must have a connection with interstate commerce.

Now, whether the evidence proves to you, as it must, beyond a reasonable doubt that it has an interstate connection as that term has been defined is up to you to decide. You must, you must find that element by proof beyond a reasonable doubt along with the other elements in the case.

* * *

RELEVANT DOCKET ENTRIES

United States District Court:

9/10/73	INDICTMENT
9/21/73	Arraignment. Defendant released on bond.
10/03/73	MOTION for bill of particulars—filed by Defendant.
10/05/73	GOVERNMENT'S answer to Defendant's motion for bill of particulars—filed.
10/05/73	Hearing on motions.
10/23-24/73	Jury trial—Defendant convicted and released on bond.
11/30/73	Sentencing. Judgment and commitment order entered.
12/07/73	NOTICE of appeal filed.
12/10/73	ORDER extending time for filing record on appeal.
2/12/74	Record on appeal in three volumes sent to United States Court of Appeals.

United States Court of Appeals:

8/08/75	Trial transcript filed.
9/09/75	Appellant's brief and Appendix filed.
10/06/75	Government brief filed.
11/14/75	Case argued.
1/29/76	Opinion of Court of Appeals.

No. 75-1344

FILED

JUL 8 1976

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD A. SCARBOROUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

ROBERT B. REICH,
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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1976. On February 26, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 19, 1976, and the petition was filed on March 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether proof that a firearm has previously traveled in interstate commerce may establish possession of a firearm "in commerce or affecting commerce," under 18 U.S.C. App. 1202(a).

2. Whether the seizure of firearms in petitioner's residence by state officers during a lawful search for narcotics pursuant to a search warrant violated the Fourth Amendment because a federal agent was present at the time of the search and received the firearms from the state officers.

STATUTE INVOLVED

18 U.S.C. App. 1202(a)(1) provides, in pertinent part:

> (a) Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of possessing in commerce or affecting commerce a firearm after having been convicted of a felony, in violation of 18 U.S.C. App. 1202(a). He was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App.).

1. In 1972, petitioner pleaded guilty in a Virginia state court to possession of narcotics with intent to distribute (S.T. 91, 97).[1] In August 1973, upon learning that petitioner was selling narcotics from his residence, state law enforcement officers obtained state warrants for petitioner's arrest and for a search of his residence for narcotics. They asked federal agent William Seals of the Bureau of Alcohol, Tobacco, and Firearms to be present during the arrest and search, since they suspected that petitioner was in possession of a firearm (Pet. App. 2a, n. 3).

[1]"S.T." refers to the separate, blue-covered transcript, containing part of the trial testimony; "Tr." refers to the main transcript, containing the testimony on the motion to suppress, as well as the remainder of the trial.

The state officers arrested petitioner and searched his residence. Agent Seals did not participate in the search (Tr. 7-12, 19-20, 33, 37, 102-102a, 109, 111-113). When, during the search, the state officers found four firearms in petitioner's bedroom,[2] they turned them over to Agent Seals for unloading (Tr. 11-12).[3] Agent Seals thereupon confiscated the firearms. It subsequently was determined that each firearm had traveled in interstate commerce prior to its possession by petitioner (Pet. App. 3a, n. 5; S.T. 52-71; Tr. 135-139).

Petitioner subsequently was charged with receipt and possession of the firearms after having been convicted of a felony. At trial, after the government had presented its evidence, the district court granted petitioner's motion for a judgment of acquittal on that portion of the indictment charging him with receipt, on the ground that the government had failed to produce any evidence of receipt of a firearm after petitioner had been convicted of a felony (Pet. App. 2a-3a). At the close of the trial, the court in-

[2]The search also elicited a hashish pipe, but no narcotics (Tr. 17, 35).

[3]Contrary to petitioner's assertion (Pet. 4), Agent Seals did not testify at the preliminary hearing that he found two of the firearms. Seals testified that after Officer James Phipps found the first two firearms, he gave them to Seals for unloading; while kneeling on the floor unloading the guns, Seals observed the second two firearms under the bed. Phipps, who saw them under the bed at about the same time, thereupon removed the firearms and gave them to Seals (Tr. 11-12, 23-25).

structed the jury on the offense of possession as follows (S.T. 158-159):

> The government may meet its burden of proving a connection between commerce and the possession of a firearm by a convicted felon if it is demonstrated that the firearm possessed by a convicted felon had previously traveled in interstate commerce.
>
> * * * * *
>
> It is not necessary that the government prove that the defendant purchased the gun in some state other than that where he was found with it or that he carried it across the state line, nor must the government prove who did purchase the gun.

DISCUSSION

1. Petitioner contends that the court of appeals erred in construing 18 U.S.C. App. 1202(a) to prohibit convicted felons from possessing firearms that previously traveled in interstate commerce but were not so moving at the time of the charged possession. Section 1202(a) prohibits convicted felons from "possess[ing] * * * in commerce or affecting commerce * * * any firearm." The possession of a firearm that previously traveled in interstate commerce has a sufficiently direct effect upon commerce to come within the ambit of the statute, as Congress indicated by finding that "possession * * * of a firearm by felons * * * constitutes * * * a burden on commerce or threat affecting the free flow of commerce" (18 U.S.C. App. 1201).

Had Congress intended to limit the statute to possessions that were contemporaneous with interstate travel, it presumably would have used language clearly accomplishing that effect, such as that it employed elsewhere in the Omnibus Crime Control and Safe Streets Act of 1968,

as amended, of which 18 U.S.C. App. 1202(a) is a part, to describe possession of a firearm "which is moving as, which is a part of, or which constitutes" interstate commerce (18 U.S.C. 922(j)). To construe the language of Section 1202 (a) to mean the same as that of Section 922(j), moreover, would permit convicted felons to retain in their possession any firearm they received prior to their conviction. Such a construction appears inconsistent with the broad purpose of the 1968 gun control legislation, which was to curb crime by "keep[ing] firearms out of the hands of those not legally entitled to possess them because of * * * criminal background" (S. Rep. No. 1501, 90th Cong., 2d. Sess. 22 (1968); see *Barrett* v. *United States,* No. 74-5566, decided January 13, 1976), and to assure that "[u]pon his conviction * * * every assassin, murderer, thief and burglar [would be denied] the right to possess a firearm * * *." 114 Cong. Rec. 14773 (1968). [4]

Petitioner relies upon a statement in *United States* v. *Bass*, 404 U.S. 336. There, after holding that the words "in commerce or affecting commerce" in the statute apply to "receiv[ing]" and "possess[ing]" and not just to "transport[ing]" firearms, a plurality of the Court went on to note how the government could meet its burden of proving a nexus with interstate commerce (404 U.S. at 350):

> The Government can obviously meet its burden in a variety of ways. We note only some of these. For example, a person "possesses . . . in commerce or affecting commerce" if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce.

---

[4]The limiting construction would also create grave problems of proof even when the receipt occurred after the conviction, since date of receipt will often be impossible to prove.

> Significantly broader in reach, however, is the offense of "receiv[ing] . . . in commerce or affecting commerce," for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce.

Petitioner asserts that because the government need only show that the firearm previously traveled in commerce to establish a receipt "in commerce or affecting commerce," and because the plurality deemed the offense of receipt "[s]ignificantly broader in reach" than the offense of possession, it follows that the government must show something more than that the firearm previously traveled in commerce to establish a possession "in commerce or affecting commerce."

As the court of appeals observed in the instant case, however, the plurality in *Bass* did not intend to fix definite criteria for establishing interstate nexus, and did not base its statement upon an analysis of the statute's language or legislative history, but attempted to "not[e] 'only some' " of the ways in which that burden might be met (Pet. App. 4a). Accordingly, its suggestion that receipt of a firearm "in commerce or affecting commerce" could be established by showing that the firearm previously traveled in interstate commerce did not preclude the government from establishing possession "in commerce or affecting commerce" by making the same showing. The Sixth Circuit has construed the statute in the same manner as the Fourth. See *United States* v. *Jones*, C.A. 6, No. 75-1817, decided March 30, 1976; *United States* v. *Bush*, 500 F. 2d 19 (C.A. 6); *United States* v. *Brown*, 472 F. 2d 1181 (C.A. 6).[5]

[5]Petitioner seeks to distinguish the Sixth Circuit cases (Pet. 9-10) on the ground that the defendants in those cases were charged with receipt as well as possession. Whatever weight that distinction has in a case like *Brown*, where the stipulated evidence apparently fixed the date of receipt as occurring after the felony conviction, it has no significance in a case like *Bush*, where there is no indication that receipt was proved except by the proof of possession itself. In any event, in *Jones* the defendant was charged only with possession, and the court explicitly held "that when a person is charged with possession of a firearm but not with receipt of it, proof that the firearm was manufactured outside the state in which the possession occurred is sufficient to support a finding that the possession was in or affected commerce." Slip op. 8-9. See also *United States* v. *Carter*, C.A. 6, No. 75-2215, decided April 28, 1976, petition for a writ of certiorari pending, No. 75-1882.

The construction of 18 U.S.C. App. 1202(a) by the Fourth and Sixth Circuits, however, is contrary to recent decisions of three other courts of appeals, which have read the plurality's statement in *Bass* to require a showing that possession of the firearm was contemporaneous with its interstate travel. *United States* v. *Bell*, 524 F. 2d 202 (C.A. 2); *United States* v. *Cassity*, 509 F. 2d 682 (C.A. 9); *United States* v. *Johnson*, C.A. 7, No. 75-1875, decided June 11, 1976. Cf. *United States* v. *Steeves*, 525 F. 2d 33, 38 (C.A. 8). Moreover, the question of the degree of interstate nexus that must be shown to establish possession is important to the administration of the gun control laws. Accordingly, we do not oppose the petition for a writ of certiorari with respect to the first question presented.

2. Petitioner also contends that the seizure of the firearms from his residence violated his Fourth Amendment rights because a federal agent accompanied the state officers during their execution of the state search warrant and received the firearms from the state officers. Petitioner does not claim that the state search for narcotics was a pretext for a search for firearms; he concedes (Pet. 12) that the state officers were lawfully at his residence. Nor is there any question that the state officers

lawfully could have seized the firearms during their search for narcotics and later have turned them over to the federal agent, had the federal agent not been present (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-468; *Alderman* v. *United States*, 394 U.S. 165, 177 n. 10). There is no suggestion that the search by the state agents went beyond the scope of search authorized by the warrant.

Petitioner does contend that the firearms were discovered in a separate search and seizure, conducted by the federal agent who accompanied the state officers, and that the failure of the federal agent to obtain a separate federal warrant for the firearms rendered that search and seizure unreasonable. The evidence showed, however, that the federal agent did not undertake any search but merely received firearms that were discovered in plain view by one of the state officers while searching for narcotics. Moreover, even if the receipt and taking of the firearms by the federal agent were viewed as a seizure under the Fourth Amendment, it was not rendered unreasonable by the failure of the federal agent to procure a separate federal warrant. The state warrant sufficiently protected petitioner's Fourth Amendment rights. The seizure was no more intrusive because it was accomplished by a federal agent rather than by a state officer.[6]

Nor does this decision conflict with *United States* v. *Sanchez*, 509 F. 2d 886 (C.A. 6), which held that evidence seized by a federal agent who had accompanied state

[6] *Lustig* v. *United States*, 338 U.S. 74, and *Byars* v. *United States*, 273 U.S. 28, upon which petitioner relies, are inapposite. In those cases, the state searches which elicited evidence were unlawful. Accordingly, the court held that such evidence could not be used in a federal prosecution if federal agents participated in or originated the idea for the searches. By contrast, the state search in the instant case was lawful, and there was no suggestion that the federal agent originated the idea for the search or participated in it.

officers into the defendant's house pursuant to a lawful state search warrant could not be used in a federal prosecution. In *Sanchez*, the Sixth Circuit concluded that the Fourth Amendment had been violated not by the federal agent's mere presence during the search but by the agent's seizure of certain explosives without a warrant. 509 F. 2d at 890. Here, however, petitioner's firearms were observed in plain view and seized by *state* officers (see pp. 2-3, *supra*), who "ha[d] a right to be in the position to have that view * * *." *Harris* v. *United States*, 390 U.S. 234, 236. Since this evidence was validly obtained by the state officers, it could properly be delivered to the federal agent and used in a federal prosecution.[7]

[7] Moreover, in *Sanchez* the court repeatedly emphasized that the federal agent had had both probable cause to suspect that the explosives would be found and the opportunity to obtain a federal warrant (509 F. 2d at 888, n. 2, 889, 890), whereas there is no suggestion in this case that Agent Seals could have procured a warrant to search for the firearms (Pet. 11).

CONCLUSION

For the foregoing reasons, we do not oppose the petition for a writ of certiorari with respect to the first question presented. The petition should be denied with respect to the second question presented.

Respectfully submitted.

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JULY 1976.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1344

RICHARD A. SCARBOROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not published and attached as an appendix to the Petition for a Writ of Certiorari.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 29, 1976.

On October 4, 1976, this Court granted the Petition for a Writ of Certiorari limited to Question No. 1 presented by the Petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Title 18 U.S.C. App. §1202(a) provides in pertinent part:

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony' . . .

* * *

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined no more than $10,000 or imprisoned for not more than two years, or both.

QUESTION PRESENTED

Whether the Court erred in holding that a conviction under 18 U.S.C. App. §1202(a) for possession of a firearm in commerce or affecting commerce by a convicted felon is sustainable merely upon a showing that the possessed firearm has previously at any time, however remote, traveled in interstate commerce.

STATEMENT OF THE CASE

On September 8, 1972, Mr. Scarborough was convicted in the Circuit Court of Fairfax County, Virginia, on felony charges of possession with intent to distribute a controlled drug [A. 2]. Subsequently, on August 1, 1973, petitioner was arrested, by a county policeman, who then obtained a search warrant for any controlled

substance that might be found in Scarborough's home. Thereafter, several policemen made a search and seized four weapons within the Scarborough residence, where the petitioner lived with his wife.

Scarborough was subsequently charged in a one count indictment alleging receipt and possession of the four firearms in violation of 18 U.S.C.App. §1202(a) [A. 1]. During pretrial discovery in the District Court, the Government acknowledged in a Bill of Particulars that the possession of the four weapons affected commerce by having previously traveled in commerce anywhere from over three years to eighty years prior to petitioner's state felony conviction [A. 5].

On October 23, 1973, a jury trial was held before the Honorable Albert V. Bryan, Jr., District Court Judge for the Eastern District of Virginia, Alexandria Division. At trial, numerous witnesses were called by the Government in an attempt to establish that the seized weapons had traveled in and affected interstate commerce [A. 6-9]. However, with regard to all four weapons, the proof uniformly established movement in interstate commerce *prior* to September 8, 1972, the date upon which the petitioner became a convicted felon. The Universal Enforcer was shown to have been shipped on May 21, 1969 [A. 8]; the Colt Cobra was shown to have been shipped in mid 1969 [A. 6]; the M-1 rifle was shown to have been shipped in 1966 [A. 9]; and the fourth weapon was shown only to have been manufactured in France at an uncertain time in the late 1800's [A. 10]. The evidence further bore out that petitioner had come into possession of these firearms well before the date of his state conviction [A. 10-11].

Because no evidence was introduced showing that these guns had moved in or affected commerce at any time after his state conviction, counsel for petitioner

moved for a judgment of acquittal at the close of the Government's case. The Court then dismissed that part of the indictment alleging "receipt," as there was not any evidence of receipt of any weapon after the felony conviction [A. 12]. The case concerning possession, however, continued. The Court later denied a proffered instruction concerning the required nexus between possession and commerce, which stated in pertinent part:

> In order for the defendant to be found guilty of the crime with which he is charged, it is incumbent upon the Government to demonstrate a nexus between the 'possession' of the firearms and interstate commerce. For example, a person 'possesses' in commerce or affecting commerce if at the time of the offense the firearms were moving interstate or on an interstate facility, or if the 'possession' affected commerce. It is not enough that the Government merely show that the firearms at some time had traveled in interstate commerce. . . . [A. 12-13]

This instruction was based on this Court's opinion in *United States v. Bass,* 404 U.S. 336, 350 (1971).

Instead, the Court instructed the jury that:

> . . . The government may meet its burden of proving a connection between commerce and the possession of a firearm by a convicted felon if it is demonstrated that the firearm possessed by a convicted felon had previously traveled in interstate commerce. . . . [A-13]
>
> It is not necessary that the government prove that the defendant purchased the gun in some state other than that where he was found with it or that he carried it across the state line, nor must the government prove who did purchase the gun. . . . [W]hile the government must prove the connection

> with interstate commerce beyond a reasonable doubt, under the instruction which I gave you which allows the government to meet that burden by showing that the weapon or weapons had previously been transferred in interstate commerce, there seems to me to be not much of an issue on that score. . . . [A. 14].

Thereafter, on October 24, 1973 Scarborough, having previously been convicted of a felony, was found guilty of possession of four firearms in commerce or affecting commerce. On November 30, 1973, petitioner was sentenced to confinement for a period of one year, said sentence to run consecutively with any current sentence. Petitioner is presently free on bond for this conviction.

On January 29, 1976, the United States Court of Appeals for the Fourth Circuit affirmed Scarborough's conviction, holding that mere possession of firearms that have previously traveled in interstate commerce provides a sufficient nexus between that possession and commerce so as to support a conviction under 18 U.S.C. App. §1202(a), regardless of whether the firearms came to rest in the possession of an individual before having been convicted of a felony.

ARGUMENT

A CONVICTION UNDER 18 U.S.C. App. §1202(a) FOR POSSESSION OF A FIREARM IN COMMERCE OR AFFECTING COMMERCE BY A CONVICTED FELON CANNOT BE SUSTAINED MERELY UPON A SHOWING THAT THE POSSESSED FIREARM HAS PREVIOUSLY TRAVELED IN INTERSTATE COMMERCE AT ANY TIME, HOWEVER REMOTE.

In *United States v. Bass*, 404 U.S. 336 (1971), the Court held that under 18 U.S.C. App. §1202(a), a nexus to interstate commerce must be shown with respect to a convicted felon receiving, transporting, or possessing a firearm. 404 U.S. at 347. The Court affirmed the Second Circuit's decision reversing Bass' conviction, since the Government failed to allege or prove any nexus with interstate commerce. 404 U.S. at 347. The question presented in this case concerns the degree of nexus to commerce required to sustain a conviction for possession of a firearm by a convicted felon. That question has already been answered by a plurality of this Court.

In Part III of the *Bass* opinion, Justice Marshall, joined by Justices Douglas, Stewart, and White, discussed the necessary commerce nexus that must be proven with respect to the "possession" and "receipt" offenses and stated that a greater nexus must be shown for a possession conviction than for a receipt conviction:

> The Government can obviously meet its burden in a variety of ways. We note only some of these. For example, a person 'possesses . . . in commerce or affecting commerce' if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce. Significantly broader in reach, however, is the offense of 'receiv[ing] . . . in commerce or affecting commerce,' for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce.

404 U.S. at 350 (footnote omitted).

Concerned with the delicate balance between state and federal law enforcement, the Court in *Bass* declared, "We do not interpret §1202(a) to reach the 'mere possession of firearms.'" 404 U.S. at 350. The position of the Government that a conviction for possession of a firearm may be sustained merely upon a showing that the firearm had at some time, however remote, traveled in commerce, even though the gun had long since come to rest, clearly seeks to make "mere possession" illegal.

The distinction between receipt and possession is well founded. Although there is a conflict among the Circuits concerning whether proof of a firearm's prior travel in interstate commerce is sufficient to convict for either receiving or possessing, the more reasonable view is that the crime of possession must hinge upon more than proof that the gun had previously traveled in interstate commerce prior to the individual's felony conviction. Principles of statutory construction, coupled with important considerations inhering in principles of federalism, judicial restraint and judicial economy, support the proposition that conviction for possession must be predicated upon proof of a contemporaneous effect upon commerce.

A. The Language Of §1202(a) Is Directed Only At Possession Offenses Occurring Contemporaneously With Commerce.

In *United States v. Bass*, 404 U.S. 336 (1971), the Court found the language of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L.

90-351, 82 Stat. 197, 18 U.S.C. App. §1202(a), to be too ambiguous to be read so broadly as to dispense with the requirement of a nexus with interstate commerce as an element of each offense listed in §1202(a). If the reach of the statute as a whole is opaque, however, the language concerning the proper commerce nexus required to state an offense is not. Adherence to the most elementary principle of statutory construction that the plain meaning of words must be respected necessarily leads to the conclusion that the crime of possession is only cognizable if there is a contemporaneous nexus with commerce.

Section 1202 of Title VII in pertinent part provides:

> (a) any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . .
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of the enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Since the commerce language in this statute, "receives, possesses, or transports in commerce or affecting commerce" is in the present tense, it can fairly be read to reach only a contemporaneous use of or effect on commerce. The commerce language contrasts sharply with the tense Congress used regarding the prior felony conviction requirement of §1202(a), "has been convicted. . . ." As this Court explained last Term in *Barrett v. United States,* 423 U.S. 212 (1976), the Court must recognize Congress' use of different tenses within the same statute in the construction of that statute and follow their varying effects.

In *Barrett,* unlike here, the interstate commerce reference in the statute, 18 U.S.C. §922(h), was in the present perfect tense,[1] thereby "denoting an act that is completed." 423 U.S. at 216. The Court explained further, "had Congress intended to confine §922(h) to direct interstate receipt, it would have so provided, just as it did in other sections of the Gun Control Act." 423 U.S. at 217. Congress did precisely that in §1202(a). There it used the present tense, thereby conveying that only a contemporaneous connection to commerce would sustain a conviction. And just as in *Barrett,* this Court must adhere to the language Congress chose, for "Congress knew the significance and meaning of the language it employed." 423 U.S. at 217.

Thus, unlike §922(h), §1202(a) encompasses only crimes with a present connection to commerce. That difference cannot be ignored, since "no conclusion can be drawn from Title IV [§922(h)] concerning the correct interpretation of Title VII [§1202]." *United States v. Bass,* 404 U.S. 336, 344 (1971). The fact that two statutes serve related purposes does not permit the Court to ignore clear differences in language and scope between them. *Erlenbaugh v. United States,* 409 U.S. 239, 244-47 (1972). Indeed, it is fitting that the commerce language of §1202(a) is more confining than that in §922(h),

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[1]Section 922(h) provides, in pertinent part:

> It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * * *
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

since §1202(a) includes a broader range of offenses than §922(h), including simple possession. As will be made clear below, principles of federalism dictate that firearm possession offenses are more properly subjects of state enforcement, so that the narrower federal role contemplated by §1202(a) for prosecuting such offenses than is available for receipt offenses under §922(h) is perfectly comprehensible. Accordingly, the differences in language between §922(h) and §1202(a) make sense, and must be respected.

In this case, those principles of construction inevitably require the reversal of Scarborough's conviction, since Scarborough's possession had no contemporaneous nexus with commerce. As is clear from the record, subsequent to his felony conviction, the firearms which are the subject of this prosecution merely rested in Scarborough's house.[2] Accordingly, statutory language itself

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[2]Although there was some evidence that Scarborough ordered parts for one of the weapons after his felony conviction, the jury was instructed that it could find Scarborough guilty if it simply found that "the firearm possessed by a convicted felon had previously traveled in interstate commerce." A. 14. Indeed, the trial court virtually directed the jury to return a verdict of guilty based only on the prior interstate travel of the gun: ". . . under the instruction which I gave you which allows the government to meet that burden by showing that the weapon or weapons had previously been transferred in interstate commerce, there seems to me to be not much of an issue on that score." [A. 14].

Thus, the Court need not reach the question whether ordering parts for a firearm already in possession estabiishes the requisite commerce nexus. So long as the jury was told that it could—and should—convict Scarborough simply on the basis of the gun's travel prior to his felony conviction, his conviction here must be reversed. *Clay v. United States*, 403 U.S. 698, 704 (1971); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Sicurella v. United States*, 348 U.S. 385 (1955); *United Bhd. of Carpenters and Joiners v. United States*, 330 U.S. 395, 408-09 (1947); *Stromberg v. California*, 283 U.S. 359 (1931).

suffices to find a requirement of a contemporaneous nexus with commerce in §1202(a).

A contrary result is not suggested by analysis of the legislative history of §1202(a). The Court in *Bass* concluded that the legislative history failed to provide a clear purpose which could guide the courts in interpreting the statute. 404 U.S. at 346. *See, Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). There is some indication in the Senate debates, however, that the intent of Congress in enacting both this Section and §922(h) was to prevent a convicted felon's "acquisition" of a firearm subsequent to a felony conviction. *See Barrett v. United States*, 423 U.S. 212 (1976). As the Eighth Circuit noted in *United States v. Kelly*, 519 F.2d 251, 253 n.3 (8th Cir.), *cert. denied*, 423 U.S. 926 (1975), Senator Long, the statute's sponsor, consistently used the word "acquire," as if synonomous with the word "receive."[3]

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[3]Excerpts from Senator Long's statements on the floor of the Senate amply illustrate this point:

> A lot of people have objected to the Dodd gun bill on the theory it would make it difficult for honorable people—who have a right to have weapons for the defense of their homes to acquire weapons—and would make it somewhat cumbersome and burdensome for people to cross state boundaries seeking an opportunity to hunt or engage in other sports activities, as they have historically done in this country.
>
> 114 *Cong. Rec.* 13,868 (1968).

> It would be a bother to them, and it would not really prevent what it seeks to prevent in that it would not have, for example, prevented Oswald from acquiring the weapon with which he killed John Kennedy. And it would not have kept the assassin of Martin Luther King from acquiring the weapon he used for that dastardly act.
>
> *Id.*

[Footnote continued]

Senator Long's language in the debate focusing on the prevention of the acquisition of weapons by convicted felons is appropriate. The conviction justifies restricting a person's access to weapons, as the person has already inflicted injury to society. It is quite a different matter, however, to punish a person who has acquired a gun prior to a felony conviction and who does nothing with it after the conviction except to store it in his house. Certainly if the individual does bring the weapon into commerce in the manner suggested in Part III of *Bass,* the federal police power should be invoked; but if he does not, there is no justification for punishing him.

The rules of statutory construction also compel a greater commerce nexus to convict for possession than for receipt. It is well settled that if a criminal statute is capable of inconsistent interpretations, the ambiguity should be resolved in favor of lenity. *See e.g., United States v. Bass,* 404 U.S. 336, 347 (1971); *Rewis v. United States,* 401 U.S. 808 (1971); *Bell v. United States,* 349 U.S. 81 (1955). Penal statutes must be strictly construed to provide fair notice as to what conduct is specifically proscribed. *See United States v. Bass,* 404 U.S. 336,

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The killer of Medgar Evers, the murderer of the three civil rights workers in Mississippi, the defendants who shot Capt. Lemuel Penn (on a highway while he was driving back to Washington after completion of reserve Military duty) would all be free under present federal law to acquire another gun and repeat those same sorts of crime in the future.

114 *Cong. Rec.* 14,773 (1968).

The assassin of George Lincoln Rockwell and the murderer of Malcolm X could lawfully acquire a gun upon their release from prison and kill again.

Id.

348 (1971); *McBoyle v. United States,* 283 U.S. 25, 27 (1931) (Holmes, J.). In the absence of a legislative directive, it is not the province of the Court to imply one. As Chief Justice Marshall wrote in *United States v. Wiltberger,* 18 U.S. (5 Wheat) 76 (1820):

> The rule that penal laws are to be construed strictly, is perhaps not much less old than [statutory] construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.
>
> 18 U.S. (5 Wheat) at 95.

And, as the Court explained in *Bass,* "where there is ambiguity in a criminal statute, doubts are to be resolved in favor of the defendant." 404 U.S. at 348. Therefore, the statute should be interpreted to require a contemporaneous nexus to commerce to convict for possession of a firearm by a felon.

Finally, statutes should be construed to preserve their integrity. *Weinberger v. Hynson, Westcott and Dunning, Inc.,* 412 U.S. 609, 633 (1973); *United States v. Campos-Serrano,* 404 U.S. 293 (1971). Section 1202(a) proscribes three separate offenses: receiving, possessing, or transporting firearms in commerce by a convicted felon. If the commerce nexus is held by the Court to occur when the gun came into possession of the convicted felon, then the crime is not possession at all, but *receipt,* and the Court's interpretation would merge the two crimes. This approach was taken by the Sixth Circuit, *Carter v. United States,* No. 75-2215 (6th Cir. 1976), *petition for cert. filed,* 45 U.S.L.W. 3165 (U.S. Je. 28, 1976) (No. 75-1882); *United States v. Jones,* 533 F.2d 1387 (6th Cir. 1976); *United States v. Bush,* 500

F.2d 19 (6th Cir. 1974); *United States v. Brown*, 472 F.2d 1181 (6th Cir. 1973), but is plainly incorrect: the crimes are listed as separate and distinct in §1202(a), and there is no justification available to treat them as one.

The observation of the Sixth Circuit in *United States v. Brown, supra,* that "one cannot very well possess a firearm without receiving it," 472 F.2d at 1182, merely states a truism that avoids the difference between receipt and possession. To sustain a conviction for receipt under §1202(a), for example, proof of possession is not enough:

> Under a receiving charge, the government assumes the additional burden of proving that receipt of the firearm occurred in the district where the prosecution takes place.... Venue is a fact which must always be established at trial. There are also several instances when a felon can possess a weapon without the possibility of being subject to a charge of receiving it. A felon could, for example, have received a gun before he was convicted of a felony or he could have received it beyond the statute of limitations for a receiving offense and yet still be in possession.
>
> *United States v. Kelly,* 519 F.2d 251, 258 (8th Cir.), *cert. denied,* 423 U.S. 926 (1975) (footnote and citations omitted).

The blurring of the distinction between receipt and possession by the Sixth Circuit, as one court explained, "obliterates the carefully drawn distinction between the separate offenses made by the Supreme Court in *Bass* and eviscerates the language of the statute which provides for three discrete crimes." *United States v. Bell,* 524 F.2d 202, 208 n.7 (2nd Cir. 1975). Even more disturbing, the effect of this approach is to punish Scarborough for receipt of firearms prior to the time such receipt was

unlawful, since at the time he received the gun, he had not been convicted of a felony.

Moreover, adoption of the Government's reading would create additional problems as applied to a person's first felony trial. As soon as a judgment of conviction is entered, if he possessed any firearms which had previously traveled in commerce, he would immediately be in violation of §1202(a). If a person could not afford bond and thereafter entered a guilty plea, he could conceivably never have an opportunity to relinquish possession. Following acceptance of the plea, the Government could immediately seize any weapons in the defendant's possession and initiate federal proceedings under §1202(a). Although this situation may seem unduly hypothetical, such a result could legally occur if it is held that possession need not have a contemporaneous effect upon commerce.

B. To Permit Prosecution For Possession of a Firearm Without A Contemporaneous Nexus To Commerce Would Interfere With The Allocation Of State and Federal Jurisdiction In A Federalist System Without A Clear Intent By Congress To Do So.

The Government's view of §1202(a) necessarily challenges the premise upon which *Bass* rests: the allocation of criminal jurisdiction between the states and the federal government. For the Government to prevail, the Court must reject principles of federalism supporting *Bass* which are deeply rooted in federal jurisprudence, and involve considerations to which this Court has become increasingly sensitive.

This Court has already held that, in view of its ambiguity, hasty enactment, and paucity of legislative

history, §1202(a) must be narrowly construed to avoid intruding into traditional areas of state criminal jurisdiction. *United States v. Bass,* 404 U.S. 336, 349-50 (1971). In *Bass,* the Court echoed *United States v. Five Gambling Devices,* 346 U.S. 441, 450 (1950), where the Court, in an opinion by Justice Jackson, warned that only an "unmistakable intention" by Congress would permit it to interpret an anti-gambling statute as purporting to eliminate the requirement of a nexus with interstate commerce. Such an interpretation would have an "extreme impact upon affairs considered normally reserved to the States," 346 U.S. at 450, and could not be construed so casually. In *Bass,* the Court reaffirmed these principles:

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in judicial decision.
>
> 404 U.S. at 349 (footnotes omitted).

Since "absent proof of some interstate commerce nexus *in each case,* §1202(a) dramatically intrudes upon traditional state criminal jurisdiction," 404 U.S. at 350 (emphasis added), the Court construed the statute to include an interstate commerce nexus as an element of each offense listed in that Section.

Since *Bass*, the Court has continued to interpret federal criminal statutes consistent with these guidelines. In *United States v. Enmons,* 410 U.S. 396 (1973), for

example, the Government attempted to prosecute union members under the Hobbs Act, 18 U.S.C. §1951, for violence which erupted in a labor strike. The Court there recognized that the control of picket line violence was traditionally a state prerogative, so that "it would require statutory language much more explicit than that before us to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes." 410 U.S. at 411. The Court went on to state that the Hobbs Act could not be construed, as written, to justify "such an extraordinary change in federal labor law of such an unprecedented incursion into the criminal jurisdiction of the states." 410 U.S. at 411. *Cf., Heublein v. South Carolina Tax Commission,* 409 U.S. 275 (1972); *Rewis v. United States,* 401 U.S. 808 (1971).

In accordance with these principles, the Court in *Bass* required, as an element of each §1202(a) offense, proof of a nexus between the defendant's act and interstate commerce. For the crimes of receipt or transport of a firearm, that nexus is straightforward enough, and proof will be simple. Those offenses necessarily involve either a transaction or movement, so are traditionally understood to be directly within commerce. Even in cases where the individual receipt or transport transaction does not involve interstate commerce, the transaction itself is properly said to be in commerce. *See Barrett v. United States,* 423 U.S. 212 (1976). As one Court of Appeals put it, receipt and transport have a definite "federal jurisdictional flavor," *United States v. Bell,* 524 F.2d 202, 209 (2nd Cir. 1975). Federal statutes generally punish offenses concerning movement or acts affecting commerce, *e.g.,* 18 U.S.C. §1951 (obstructing or affecting interstate commerce or movement of commodities in

commerce by robbery or extortion); 18 U.S.C. §875 (transmitting kidnapping threats by means of interstate commerce); 18 U.S.C. §2421 (transporting women in interstate commerce for prostitution).

Mere possession of a firearm, on the contrary, is not so obviously linked to commerce. Unlike receipt or transport, possession is not normally in commerce, nor does it affect commerce. In this case, the connection between Scarborough's possession of a firearm after conviction and commerce could hardly be more distant. Prior to his felony conviction, Scarborough's guns passed through interstate commerce; since his conviction, the relevant triggering event for §1202(a), they have had no connection with commerce of any sort. They have not been used; they have not even been moved. It is for that reason, as *Bass* recognized, that possession is the kind of crime which is "traditionally local criminal conduct," 404 U.S. at 350, the regulation of which belongs in the states and has been left there by Congress.[4] Federal concern and the

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[4]Thirty-seven states and the District of Columbia prescribe whether convicted felons may possess or buy firearms. This list excludes regulation of the use of machine guns by convicted felons. *See* Ala. Code. tit. 14, §174(a) (1958); Alaska Stat. §11.55.030 (1970); Ariz. Rev. Stat. Ann. §13-909(A) (1956); Ark. Stat. Ann. §41-3103(1)(a) (1947); Cal. Penal Code §12021(a) (1970); Colo. Rev. Stat. Ann. §18-12-108 (1973); D.C. Code §22-3203(2) (1973); Fla. Stat. Ann. §790.23(1) (1976); Hawaii Rev. Stat. §134-7(b) (1968); Ill. Rev. Stat. tit. 38, §24-3.(a)(3) (Smith-Hurd 1976); Ind. Stat. Ann. §35-23-4.1-6 [Burns 10-4751f] (1975); Kan. Stat. Ann. §21-4204(1)(b) (1974); Ky. Rev. Stat. Ann. §527.040(1) (1969); La. Rev. Stat. Ann. §14:95.1 (West 1976); Me Rev. Stat. Ann. tit. 15, §393 (1964); Md. Ann. Code tit. 27, §445(c) (1976); Mass. Gen. Laws Ann. ch. 140, §122 (1972); Mich. Stat. Ann. §28.92 (1962); Minn. Stat. Ann. §624.713(1)(b) (West 1976); Miss. Code Ann. §97-37-5 (1972); Neb. Rev. Stat. §28-1011.15 (1975); Nev. Rev. Stat. §202.360 (1973); N.H. Rev. Stat. Ann. ch. 159:3 (1955); N.J. Stat. Ann. 2A:151-8 (1969);

[Footnote continued]

expenditure of federal resources for prosecution of a felon's possession of a firearm is consistent with federalism only if that possession directly affects commerce as in Justice Marshall's example in *Bass*. Otherwise, not only would federal activity interfere with state enforcement, but state and federal efforts would largely be duplicative, *United States v. Kelly*, 519 F.2d 251, 254 n. 5 (8th Cir.), *cert. denied*, 423 U.S. 926 (1975). Further, federal prosecutions would unnecessarily "further burden the district courts with additional criminal litigation." *United States v. Bell*, 524 F.2d 202, 209 (1975). Without a concerted policy by Congress, that balance cannot be changed.

It is these considerations which compel reinforcement of the Court's analysis in Part III of *Bass*, where the Court explained the limited circumstances in which possession is cognizable as a federal offense under this statute.[5] The Government claims that the passage in Part III of *Bass* is mere dicta, or in any event does not restrict prosecution for possession even where, as here, the

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N.Y. Penal Law §265.01(4) (McKinney 1976); N.C. Gen. Stat. §14-415.1 (1975); N.D. Cent. Code §62-01-04(1) (1960); Ohio Rev. Code Ann. §2923.13(A) (Page 1975); Okla. Stat. Ann. tit. 21, §1283 (1976); Ore. Rev. Stat. §166.270 (1975); Pa. Stat. Ann. tit. 18, §6105 (1973); R.I. Gen. Laws Ann. §11-47-5 (1956); S.C. Code Ann. §16-129.2(a) (Cum.Supp. 1975); S.D. Compiled Laws Ann. §23-7-3 (1967); Tenn. Code Ann. §39.4904 (Cum. Supp. 1974); Tex. Code Ann. tit. 10, ch. 46, §46.05(a) (Vernon 1974); Utah Code Ann. §76-10-503 (Supp. 1975); and Wash. Rev. Code Ann. §9.41-040 (1961).

Seven of the above states enacted legislation within the last three years (Ill., Ky., La., Minn., N.Y., N.C., Tenn). Additionally, municipalities and counties throughout the country regulate firearms within their respective jurisdictions. *See U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Firearms Regulation* (1976).

[5]Possession of a firearm by a convicted felon is not an offense under 18 U.S.C. §922(h). *See* n.1 *supra*.

possession originated prior to the felony conviction. But to adopt the Government's position and ignore the restrictions contained in that passage would either emasculate the integrity of the statute or the principles of federalism which support it.

If the Court determines that the interstate commerce nexus is satisfied here, the Court must adopt one of two equally untenable positions: first, it may incorporate the crime of possession into the crime of receipt, thereby eliminating the distinction between receipt and possession, *see* pages 13-14, *supra;* or second, it may use the most trivial connection to commerce to sustain a conviction, thereby demeaning the federalism principles that support the statute.

If the crime of simple possession remains distinct from the crime of receipt, then the only commerce nexus possible becomes so remote as to be trivial. Possession carries with it nothing more than the mere potential of the entry of the firearm into the stream of commerce. If that is enough to satisfy the commerce requirement, it would so impoverish principles of federalism upon which *Bass* rests that *Bass* would be overruled in fact if not in name. Accordingly, the facts purporting to meet the nexus requirement must be substantial enough to demonstrate the respect for federalism demanded by the imposition of a nexus requirement in the first place. The Court emphasized the importance of that connection in *Rewis v. United States,* 401 U.S. 808 (1971), where it held that, in statutes which do not demonstrate a clear intent by Congress to intrude on traditional areas of state criminal jurisdiction, and which require a commerce nexus in individual cases, the transactions at issue may not have the nexus satisfied by a trivial link to commerce.

In *Rewis,* the Court held that the operator of a gambling establishment could not be prosecuted under the Travel Act, 18 U.S.C. §1952, simply because some of his customers came from another state. The Court there explained that where federal prosecutions could seriously alter federal-state relationships concerning criminal jurisdiction, and where there is no explicit Congressional intent to so jeopardize the existing federal-state balance, the Court must construe the commerce nexus requirements strictly. *See Erlenbaugh v. United States,* 409 U.S. 239, 245 (1972) (Travel Act applies to criminal activity "which in all cases was materially assisted in its operations by the availability of facilities of interstate commerce.").

Since the Court has already determined in *Bass* that Congress did not intend §1202(a) to change federal-state spheres of enforcement, the nexus requirements articulated in *Rewis* with respect to the Travel Act apply with equal force here. In light of *Rewis,* the Court's illustration in Part III of *Bass* of the offenses cognizable under §1202(a) can only be understood as implementing those nexus requirements. The Court there restricted the possession crimes of §1202(a) to those where a strong nexus can be demonstrated, but does not restrict receipt crimes, which are by their nature in or affecting commerce.

Understood in that light, the examples proffered in Part III of *Bass,* relating to the Government's burden of proof, are not irrelevant plumage for an Opinion. Rather, they show that in order to preserve federalism, each offense in §1202(a) requires a different sort of nexus with commerce. As Justice, then Judge Stevens, noted in *United States v. Walker,* 489 F.2d 1353 (7th Cir. 1973), *cert. denied,* 415 U.S. 982 (1974), "the entire opinion

demonstrates that Mr. Justice Marshall's choice of language was deliberate and precise." 489 F.2d at 1357. Significantly, every Circuit that has required a showing of contemporaneous affect upon commerce for the possession offense recognized the federalism concerns voiced in *Bass*. *See United States v. Ressler*, 536 F.2d 208 (7th Cir. 1976); *United States v. Lathan*, 531 F.2d 955 (9th Cir. 1976); *United States v. Steeves*, 525 F.2d 33 (8th Cir. 1975); *United States v. Bell*, 524 F.2d 202 (2nd Cir. 1975); *United States v. Kelly*, 519 F.2d 251 (8th Cir.), *cert. denied*, 423 U.S. 926 (1975); *United States v. Cassity*, 509 F.2d 682 (9th Cir. 1974). *Cf., United States v. Goodie*, 524 F.2d 515 (5th Cir. 1975); *United States v. Walker*, 489 F.2d 1353 (7th Cir. 1973); *cert. denied*, 415 U.S. 982 (1974); *United States v. Thomas*, 485 F.2d 557 (5th Cir. 1973). Circuits holding to the contrary have conspicuously ignored these fundamental precepts of federalism. *See e.g., United States v. Scarborough*, No. 74-1193 (4th Cir. Jan. 29, 1976); *United States v. Jones*, 533 F.2d 1387 (6th Cir. 1976); *Carter v. United States*, No. 75-2215 (6th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3165 (U.S. Je. 28, 1976) (No. 75-1882); *United States v. Bumphus*, 508 F.2d 1405 (10th Cir. 1975). Accordingly, the most stringent nexus requirement must be imposed on the Government to prove possession of a firearm by a convicted felon.

More is at stake here, though, than simply applying the Court's recent interpretation of federal firearms statutes. If the Court declines to follow *Rewis* and *Bass*, and instead accepts Scarborough's meager nexus to interstate commerce in this case as sufficient, it would necessarily weaken the concepts of federalism, and the concommittant respect for state activity, which this Court has a

special duty to protect. This Court has repeatedly emphasized the measured and deliberate manner in which federal interference by any branch into activities traditionally understood to be within the scope of state prerogative must take. As the Court stated in *Younger v. Harris*, 401 U.S. 37 (1971):

> [T]he National Government, anxious though it may be to vindicate federal rights and federal interests, always endeavors to do so in ways which will not unduly interfere with legitimate activities of the States.
>
> 401 U.S. at 44.

These principles have been recently reaffirmed by the Court in the *Younger* context. *See, e.g., Hicks v. Miranda*, 422 U.S. 332 (1975); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). Furthermore, just last Term, the Court held that the commerce clause, though normally sufficient to sustain federal power over state activities, could not overcome affirmative limitations on Congress' authority inherent in state sovereignity. *National League of Cities v. Usery*, 96 S.Ct. 2465 (1976). In addition, it held that federal equitable relief should not be available to enjoin state activities where the result of such relief would disrupt legitimate operations of the internal affairs of Government. *Rizzo v. Goode*, 423 U.S. 362 (1976). If only the most tangential link to interstate commerce is required to overtake an important aspect of state criminal law, little remains of federalism in any context.

To be sure, neither *Rewis* nor restraints on the nexus requirements of § 1202(a) inherent in federalism apply to every federal criminal statute premised on interstate commerce. Congress has the power to confer federal authority to prosecute crimes previously in the state domain, and even eliminate the requirement of individual

proof that a particular transaction has a specific connection with interstate commerce. That result may only be accomplished, however, where two conditions have been met. First, Congress must explicitly and clearly decide to accomplish that end. *See e.g., United States v. Huddleston,* 415 U.S. 814, 832 n.11 (1974); *United States v. DeMet,* 486 F.2d 816 (7th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974) (Prosecutions under Hobbs Act, 18 U.S.C. §1951, require only the slightest proof of connection with interstate commerce because of legislation to the full extent of Congressional power); *United States v. Sacco,* 491 F.2d 995 (9th Cir. 1974); *United States v. Hunter,* 478 F.2d 1019 (7th Cir.), *cert. denied,* 414 U.S. 857 (1973) (18 U.S.C. §1955, regulating interstate gambling business, requires no proof of direct interstate commerce). Second, it must make specific findings that the action it seeks to take has a rational connection to the commerce power upon which it is based. *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964).

That neither of those conditions is met here is beyond dispute. On the contrary, the statute has been found by this Court to be both ambiguous and the product of last-minute legislating rather than careful and deliberate study.[6] *United States v. Bass,* 404 U.S. 336 (1971).

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[6]Following Senator Long's remarks, several Senators commented that, although the purpose behind §1202(a) was commendable, further study of the proposed amendment by a Conference Committee would be desirable. At this time, however, several Senators called for a vote and the amendment was passed without further discussion. *See* 114 *Cong. Rec.* 14,775 (1968).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals, affirming petitioner's conviction, should be reversed.

Respectfully submitted,

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No. 75-1344

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD A. SCARBOROUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 539 F. 2d 331.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1976. On February 26, 1976, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 19, 1976. The petition was filed on March 17, 1976, and was granted on October 4, 1976.

QUESTION PRESENTED

Whether 18 U.S.C. App. 1202(a), which makes it unlawful for a convicted felon, among others, to receive, possess or transport a firearm "in commerce or affecting commerce," covers possession of a firearm which previously has been shipped or transported in interstate commerce.

STATUTES INVOLVED

18 U.S.C. App. 1201 provides:

> The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce,
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States,
>
> (3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and
>
> (4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

18 U.S.C. App. 1202(a) provides in pertinent part:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. App. 1202(c) provides in pertinent part:

> As used in this title—
>
> (1) "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country; * * *.

18 U.S.C. 922(g) provides in pertinent part:

> It shall be unlawful for any person—(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year * * * to ship or transport any firearm or ammunition in interstate or foreign commerce.

18 U.S.C. 922(h) provides in pertinent part:

> It shall be unlawful for any person—(1) who is under indictment for, or who has been convicted in any court of, a crime punishable

> by imprisonment for a term exceeding one year * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted, as a previously convicted felon, of possession in commerce or affecting commerce of four firearms, in violation of 18 U.S.C. App. 1202(a)(1) (App. 1).[1] He was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App. 1a–6a; 539 F. 2d 331).

The evidence showed that in 1972 petitioner was convicted in a Virginia state court of possession of narcotics with intent to distribute, a felony (App. 2). In August 1973, law enforcement officials seized four firearms from petitioner's bedroom in Falls Church, Virginia, in the execution of a state warrant for a search of his residence for narcotics (App. 11–12).

Each of the four firearms—a .30 caliber Universal Arms Company Enforcer, a .38 caliber Colt revolver, a .30 caliber United States M–1 carbine, and a St. Etienne French Ordnance revolver—had been transported in interstate commerce prior to possession by petitioner. The Universal Arms Company Enforcer was manufactured in Florida and was shipped to Virginia, where it was sold to petitioner in 1970 (App. 7–8).[2] The Colt revolver was manufactured in Connecticut and had been shipped to a firearms dealer in North Carolina in 1969 (App. 6–7). The M–1 carbine had been shipped from an arsenal in Illinois to an individual in Maryland in 1966 (App. 8–9). The French revolver was manufactured in France during the nineteenth century (App. 9–10).

[1] The district court acquitted petitioner on another portion of the indictment charging him with receipt of the firearms, on the ground that the government had not established that the receipt occurred after the felony conviction (App. 12).

The court gave the following instruction on the relationship between possession and commerce (App. 14):[3]

> The government may meet its burden of proving a connection between commerce and the possession of a firearm by a convicted felon if it is demonstrated that the firearm possessed by a convicted felon had previously traveled in interstate commerce.
>
> * * * * *

[2] The evidence showed also that petitioner had ordered a replacement stock for the Universal Enforcer in 1973, one year after his conviction for a felony, and that the stock was subsequently shipped in interstate commerce from Florida to Virginia (Trial Transcript of reporter Webb, pp. 125–128, 137). A stock, in itself, is not a firearm as defined in 18 U.S.C. App. 1202(c)(3).

[3] The trial court refused to give petitioner's proposed instruction, which provided in pertinent part (App. 12–13): "In order for the defendant to be found guilty of the crime with which he is charged, it is incumbent upon the Government to demonstrate a nexus between the 'possession' of the firearms and interstate commerce. For example, a person 'possesses' in commerce or affecting commerce if at the time of the offense the firearms were moving interstate or on an interstate facility, or if the 'possession' affected commerce. It is not enough that the Government merely show that the firearms at some time had traveled in interstate commerce."

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> It is not necessary that the government prove that the defendant purchased the gun in some state other than that where he was found with it or that he carried it across the state line, nor must the government prove who did purchase the gun.

The court of appeals affirmed, ruling that "the Congressional purpose as expressed in the statute itself was that it was only necessary to establish that the firearm had previously traveled in interstate commerce to make out the offense whether of possession or of receipt and that [*United States* v. *Bass*, 404 U.S. 336] did not hold otherwise" (Pet. App. 4a; 539 F. 2d at 333). Noting that both "receives" and "possesses" in Section 1202(a) are modified by the same phrase, "in commerce or affecting commerce," the court held that the statute should not be construed to require proof of a greater interstate commerce nexus for possession than for receipt.

The court considered and expressly declined to follow *United States* v. *Bell*, 524 F. 2d 202, 205, in which the Second Circuit ruled that, while the receipt offense requires only that the firearm had previously traveled in commerce, the possession offense requires possession contemporaneous with interstate movement.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner contends (Br. 7) that the offense of possession of firearms under 18 U.S.C. App. 1202(a)(1) extends only to possession that has a "contemporaneous" nexus with interstate commerce, and does

not cover possession of firearms that have merely previously moved in commerce. Petitioner concedes (Br. 6–7) that the offense of receiving a firearm under Section 1202(a)(1) covers a firearm that previously moved in interstate commerce.

Petitioner's construction of the possession offense under Section 1202(a)(1) would exempt from the scope of federal gun control legislation broad categories of individuals and conduct that Congress intended to cover when it enacted that section. Petitioner's construction would permit convicted felons who received firearms before their felony convictions or before the enactment of the statute legally to retain possession of those weapons. As a practical matter, petitioner's construction would also permit convicted felons to retain possession of firearms received after their felony convictions or the enactment of the statute when the time or place the felon received the firearm is not susceptible to proof—for example, when the firearms were obtained surreptitiously. Petitioner's construction, therefore, would create a significant loophole in the statutory scheme, whose principal objective was to keep firearms out of the hands of convicted felons and other dangerous and irresponsible persons.

A. 1. The language of Section 1202(a)(1) shows that convicted felons and certain other dangerous and irresponsible persons are prohibited from both receiving and possessing any firearm that had previously travelled in interstate commerce. Congress' use of the phrase "in commerce or affecting commerce" mani-

fests a legislative intent to prohibit far more than receiving or possession of firearms contemporaneously with interstate movement. It reflects an intent broadly to prohibit the receiving and possession of firearms that have had any significant nexus with interstate commerce, including firearms that have previously moved in commerce.

Neither the language of the statute nor any rational legislative purpose supports petitioner's distinction between the interstate commerce nexus necessary to establish the receiving offense and the nexus necessary to establish the possession offense. The nature of the receiving and the possession offenses demonstrates that both may be established by proof that the firearms which are received or possessed have moved in interstate commerce.

2. The entire scheme of the federal gun control legislation confirms that Section 1202(a)(1) prohibits convicted felons from possessing firearms that have previously moved in interstate commerce. Virtually every provision of the statute is designed to keep firearms out of the hands of felons and other dangerous individuals. To construe Section 1202(a)(1) so as to permit felons to retain possession of firearms in certain common circumstances would create a gap in the statute and would undermine its central purpose. Furthermore, petitioner's construction of Section 1202(a)(1) would make that section largely superfluous, in view of 18 U.S.C. 922(g), which already prohibits convicted felons from transporting firearms "in interstate or foreign commerce."

B. The legislative history of Section 1202(a)(1) shows that Congress intended to prohibit as broadly as possible the possession of firearms by convicted felons without regard to whether the possession was in the course of interstate movement of the firearm. There is no indication in that history that the possession offense was to be restricted as petitioner urges.

C. This Court's opinion in *United States* v. *Bass*, 404 U.S. 336, does not establish that the possession offense under Section 1202(a) requires proof of possession contemporaneous with movement of the firearm in interstate commerce. The degree of proof of an interstate nexus for both the receiving and possession offenses was not an issue before the Court in *Bass*, and dicta in the Court's opinion which touched tangentially on that issue should not foreclose full consideration of the question in this case.

ARGUMENT

18 U.S.C. APP. 1202(a)(1) PROHIBITS A CONVICTED FELON FROM POSSESSION OF FIREARMS THAT HAVE PREVIOUSLY BEEN TRANSPORTED IN INTERSTATE COMMERCE

A. THE LANGUAGE AND STATUTORY SCHEME DEMONSTRATE THAT SECTION 1202(a)(1) PROHIBITS POSSESSION OF ANY FIREARM THAT HAS MOVED IN COMMERCE

1. The statutory phrase "affecting commerce" covers firearms that have moved in commerce

Section 1202(a)(1) provides criminal penalties for any convicted felon

> who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm * * *.

There can be no doubt about the power of Congress under the Commerce Clause to prohibit felons from possessing firearms that have moved in commerce. Cf. *United States* v. *Sullivan*, 332 U.S. 689, 698 (Congress has power "under the commerce clause to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce"). The power to regulate commerce "extends to those activities intrastate which so affect interstate commerce * * * as to make regulation of them appropriate means to the attainment of a legitimate end, and the effective execution of the granted power to regulate interstate commerce" (*United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119); cf. *Barrett* v. *United States*, 423 U.S. 212; *Fry* v. *United States*, 421 U.S. 542, 547. Indeed, in its findings at the beginning of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, which includes Section 1202(a)(1), Congress expressly stated (18 U.S.C. App. 1201) that "the receipt, possession, or transportation of a firearm by felons * * * constitutes—(1) a burden on commerce or threat affecting the free flow of commerce * * *."

The only issue in this case, therefore, is whether Congress in fact exercised its broad power over commerce to prohibit the possession of firearms that have moved in commerce when it prohibited possession "affecting" commerce.

The term "affecting commerce" is a comprehensive concept reflecting the exercise by Congress of the full

extent of its power to regulate commerce. Cf. *United States* v. *American Building Maintenance Industries*, 422 U.S. 271, 280:

> Congress * * * repeatedly acknowledged its recognition of the distinction between legislation limited to activities "in commerce," and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.

See, also, *National Labor Relations Board* v. *Reliance Fuel Corp.*, 371 U.S. 224, 226.

Congress' understanding of the broad reach of the term "affecting commerce" is reflected in numerous statutes employing that term. Thus, for example, in 42 U.S.C. 2000a(c), Congress defined "operations affecting commerce" to include establishments, a substantial proportion of whose product *"has moved in commerce"* (emphasis supplied). See *Katzenbach* v. *McClung*, 379 U.S. 294, 302. Similarly, 18 U.S.C. 1951, which punishes "[w]hoever in any way or degree * * * affects commerce * * * by robbery or extortion * * *" reaches conduct related to the intrastate distribution of products that have come to rest in a state after their interstate movement. *United States* v. *Pacente*, 503 F. 2d 543, 550 (C.A. 7), certiorari denied, 419 U.S. 1048; *United States* v. *Gill*, 490 F. 2d 233, 236–237 (C.A. 7), certiorari denied, 417 U.S. 968. See, also, *e.g.*, 7 U.S.C. 2132(d), 2134, 2141 and 2142; 18 U.S.C. 245(b)(3); 29 U.SC. 141, 142, 152(7), 158(b)(4), 160(a), 185, 186, 187, and 504(a)(2); 30 U.S.C. 803.

Unlike the phrase "affecting commerce," the words "in commerce" have a narrower reach: they ordinarily cover only those activities that are actually within the flow of commerce or directly connected with it. See, *e.g., Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. 186; *United States* v. *American Building Maintenance Industries, supra.*[4]

Since Congress made Section 1202(a) applicable to conduct that is either "in commerce or affecting commerce," it intended to cover possession that affected commerce because the firearm had moved in commerce. The use of the disjunctive "or" shows that Congress did not limit the reach of the statute to possession that is "in commerce," as petitioner's interpretation of the statute would do. Indeed, petitioner's theory in practical effect would read the words "affecting commerce" out of the statute and would nullify the effect of the express finding made in Section 1201 that possession of firearms by convicted felons constitutes a "threat affecting the free flow of commerce."

The phrase "in commerce or affecting commerce" modifies not only "transports," but also "receives" and "possesses." *United States* v. *Bass,* 404 U.S. 336. The Court concluded in *Bass* that the government shows a sufficient nexus with commerce under the

[4] Examples of its use in criminal statutes are found in 18 U.S.C. 922(k) (transporting "in interstate or foreign commerce" firearms whose serial numbers have been removed); 18 U.S.C. 2421 (transporting women "in interstate or foreign commerce" for the purpose of prostitution; and 18 U.S.C. 1231 (transporting strikebreakers "in interstate or foreign commerce").

"receiv[ing]" offense "if it demonstrates that the firearm received has previously traveled in interstate commerce" (404 U.S. at 350). As we show below (pp. 17–24), the congressional objective in Section 1202(a) was to bar felons and other dangerous persons from possessing firearms. In terms of that purpose, there is no reason why Congress would have wished to require proof of a greater nexus with commerce for the possession offense than for the receipt offense.

To the contrary, since prohibiting possession was the primary objective of the provision, Congress could not have intended to require the government to show a closer connection with commerce in possession than in receipt cases. In view of that primary objective, there is no reason why Congress would have intended to prohibit a convicted felon from initially receiving a firearm that had previously moved in commerce, but would have intended to prohibit possession of such a weapon only when that weapon is actually moving in commerce. In either situation, the offense is established by showing that the receipt or possession "affects" commerce in that the firearm moved in commerce prior to its receipt or possession.

Although petitioner asserts (Br. 17–21) that the receipt of a firearm has an inherently closer nexus to interstate commerce than possession, this generalization does not withstand analysis. The relative closeness of the nexus to the interstate movement of the receipt or possession of a firearm depends not upon the inherent nature of the acts of receiving or possessing

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but upon the particular circumstances. In most instances, possession follows immediately upon receipt, and both acts have the same nexus to the prior movement of the firearm in interstate commerce.

Furthermore, in some cases a felon may receive a firearm in his own state that came to rest in that state months or years before he received it. Although petitioner agrees that such a receipt would be punishable under the statute, the act of receiving has no greater nexus to interstate commerce than the act of possessing the firearm. Thus, even in those cases where the government is able to prove when and where a felon received his firearm and thus to show that he received it after his felony conviction or after the enactment of the statute, that proof may not show any greater nexus between the receipt and interstate commerce than appeared from his possession alone.[5]

Petitioner argues (Br. 13), however, that if possession requires proof only that the firearm previously moved in commerce, the offenses of possession and receipt under Section 1202(a)(1) would merge, in violation of the principle that statutes should be construed to preserve their integrity. Under our construction, however, the offenses of receipt and possession under Section 1202(a)(1), while overlapping, are not coextensive. A person may possess a firearm in violation of the statute without having received it illegally—for example, where the receipt predated the enactment of the Act or the felony conviction, or where the firearm had not yet moved in interstate commerce at the time of its receipt.

[5] Petitioner suggests that prohibiting a convicted felon from retaining possession of a firearm acquired before his conviction might lead to the inequitable result that a person would become guilty of possession in violation of Section 1202(a)(1) at the instant he is convicted of a felony, even though he may not be able to dispossess himself of the weapon (Pet. Br. 15). Since possession involves some element of control (see, *e.g.*, *United States* v. *Bonham*, 477 F. 2d 1137 (C.A. 3); *United States* v. *Holland*, 445 F. 2d 701 (C.A.D.C.)), petitioner's hypothetical is without basis. To the extent that a recently convicted felon exercises only that degree of control necessary to relinquish possession in an otherwise legal manner, we submit that his conduct would not constitute an offense under Section 1202(a)(1).

It was primarily for this reason that Section 1202(a)(1) added possession to the offenses proscribed elsewhere in the statute. Under 18 U.S.C. 922(h), a convicted felon who had received a firearm prior to the enactment of the statute or his felony conviction could legally retain possession thereafter. The legislative history shows that an object of Section 1202(a)(1) was to ensure that convicted felons could not retain possession of firearms acquired previously (see discussion, *infra*, pp. 17–24).

Indeed, under petitioner's theory that the offense of possession under Section 1202(a)(1) requires that the possession be contemporaneous with the interstate movement, there would be little difference between the offenses of possession and transportation, since the proof necessary to show transportation would usually also establish possession.

Petitioner further argues (Br. 7–9) that a congressional intent to restrict Section 1202(a)(1) to conduct that has a contemporaneous connection with interstate commerce is shown by the use of the present

tense in the phrase "receives, possesses, or transports in commerce or affecting commerce." But the Court in *Bass* recognized that the receipt of a firearm that previously had moved in interstate commerce violates the section, even though that offense is described in the present tense. 404 U.S. at 350. The act of receiving or possessing a firearm "affect[s]" commerce if the firearm previously moved in commerce, and the tense of the operative verbs defining the offense sheds no light on what kind of nexus the statute requires.

2. The statutory scheme shows that Congress intended in Section 1202(a)(1) to prohibit felons from possessing firearms that have moved in commerce

Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, which includes Section 1202 (a)(1), must be construed in conjunction with the gun-control legislation contained in Title IV of that Act, which it was intended to "complement" (114 Cong. Rec. 16286 (1968); see also *id.* at 14774; cf. *United States* v. *Bass*, 404 U.S. 336, 342).[6] Title IV makes it unlawful for convicted felons "to ship or transport any firearm or ammunition in interstate or foreign commerce" (18 U.S.C. 922(g)), and "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce" (18 U.S.C. 922(h)).

[6] The provisions of Title IV of the Omnibus Crime Control and Safe Streets Act were reenacted without relevant change in the Gun Control Act of 1968, 82 Stat. 1214. For convenience, those provisions are referred to collectively here as Title IV.

Under petitioner's interpretation of Section 1202 (a)(1), the possession offense under that section would have no broader scope than the crimes of receipt and transportation of firearms "in commerce" under Title IV. As set forth below (pp. 19–24), the legislative history shows that the purpose of Section 1202(a)(1) was to insure "that anybody who has been convicted of a felony * * * is not permitted to possess a firearm * * *. * * * [Section 1202(a)(1)] simply strikes at the possession of firearms by the wrong kind of people" (114 Cong. Rec. 13868–13869 (1968)). The intent of Congress in Section 1202(a)(1) to ban the possession of firearms by convicted felons and other persons who cannot be trusted with those weapons would be frustrated if the possession offense in that section is not broader in scope than the receipt and transportation "in commerce" offense in Title IV.

In addition to the prohibitions upon the receipt and transportation of firearms in commerce by convicted felons and other dangerous persons, Title IV regulates and prohibits a broad range of activities involving firearms, including the licensing of dealers in firearms (18 U.S.C. 923), recordkeeping and notification requirements relating to the sale or disposition of firearms (18 U.S.C. 922(e)), prohibition of the sale or disposition of firearms to felons and other potentially dangerous individuals (18 U.S.C. 922(d)), and prohibition of the common carriage in interstate commerce of firearms in violation of the statute (18 U.S.C. 922(f)). Virtually every provision in the entire statutory scheme evinces a legislative plan to

prohibit certain classes of dangerous persons from possessing firearms. As this Court stated in *Barrett* v. *United States*, 423 U.S. 212, 218, 220:

> The very structure of the Gun Control Act demonstrates that Congress did not intend merely to restrict interstate sales, but sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous.* * *
>
> * * * * *
>
> * * * Its broadly stated principal purpose was "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968).

Petitioner's theory that Title VII protects only possession of firearms moving in commerce would create serious loopholes in the congressional plan to control firearms by prohibiting felons and other dangerous individuals from possessing them. For example, under petitioner's theory the statute would not reach individuals whose possession of firearms began before the statute was enacted or before their convictions.[7] It also would bar prosecution of many felons who acquire their firearms surreptitiously (such as from illegal sources or by theft), since as a practical matter the government frequently would be unable to show

[7] Such individuals would not be guilty of receipt under Section 1202(a)(1) by the terms of that section and would not be guilty of possession under petitioner's construction because the possession would not be "contemporaneous" with the movement of the firearms in commerce.

the time when or the place where possession was acquired.[8] In all those situations, however, the evil at which the legislation was directed—the possession of firearms by dangerous persons—is no less present than in cases where the possession is contemporaneous with the firearm's movement in commerce. In endeavoring to write an effective gun-control law, Congress did not intend to leave such a serious loophole.

As this Court said in *Barrett* v. *United States, supra,* 423 U.S. at 219, in rejecting a construction which would have created a similar gap in Title IV:

> Congress surely did not intend to except from the direct prohibitions of the statute the very act it went to such pains to prevent indirectly, through complex provisions, in the other sections of the Act.

B. THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS INTENDED TO PROHIBIT THE POSSESSION BY FELONS OF FIREARMS THAT HAVE MOVED IN COMMERCE

The legislative history of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 confirms that Congress intended to supplement the gun-control provisions of Title IV of the Act by broadly pro-

[8] Such individuals would not be guilty of possession under petitioner's construction because the possession would not be contemporaneous with interstate commerce. They could not be convicted of receipt without proof that the receipt occurred after the felony conviction and after the enactment of the Act and without proof that the receipt occurred in the district where the prosecution takes place. In some circumstances, the facts concerning possession may support an inference with respect to time and place of receipt (see, *e.g.*, *United States* v. *Haley*, 500 F. 2d 303 (C.A. 8), but in many cases such an inference may not be possible.

scribing the possession of firearms by convicted felons. It shows that Congress used the words "affecting commerce" broadly, that it did not limit the coverage of the possession offense in Title VII to firearms that were being transported in commerce, and that it did not differentiate between the scope of the possession and receipt offenses of 18 U.S.C. App. 1202 (a)(1).

Title VII was introduced by Senator Long on the floor of the Senate on May 17, 1968, and was agreed to by the Senate by a voice vote on May 23, without having been referred to any committee.[9] 114 Cong. Rec. 14775 (1968). Accordingly, there were no legislative hearings and no committee reports on the statute. The legislative history of Title VII consists primarily of an explanation of the statute by its sponsor, Senator Long.[10]

Senator Long stated explicitly several times that the purpose of the proposed legislation was broadly to prohibit convicted felons and other potentially dangerous or irresponsible persons from possession of

[9] Title VII was introduced as an amendment to S. 917. 114 Cong. Rec. 13867 (1968). After the amendment passed, the Senate voted to amend H.R. 5037, a crime bill previously enacted by the House of Representatives, by deleting the House language and substituting the text of S. 917. 114 Cong. Rec. 14798 (1968). As amended, H.R. 5037 was returned to the House and approved on June 6, 1968, without further committee study. 114 Cong. Rec. 16300 (1968). The legislation, entitled the Omnibus Crime Control and Safe Streets Act of 1968, was signed into law by the President on June 19, 1968.

[10] The entire legislative history of Title VII is set forth as an appendix to the opinion in *Stevens* v. *United States*, 440 F. 2d 144, 152–166 (C.A. 6).

firearms.[11] In introducing his amendment, he commented (114 Cong. Rec. 13868–13869 (1968)):

> I have prepared an amendment which I will offer at an appropriate time, simply setting forth the fact that anybody who has been convicted of a felony * * * is not permitted to possess a firearm * * *.
>
> It might be well to analyze, for a moment, the logic involved. When a man has been convicted of a felony, unless—as this bill sets forth—he has been expressly pardoned by the President and the pardon states that the person is to be permitted to possess firearms in the future, that man would have no right to possess firearms. He would be punished criminally if he is found in possession of them.
>
> * * * * *
>
> [A] bill such as this could have prevented the assassination of President Kennedy by Lee Oswald. * * * For reasons involved in this bill, he would not have been permitted to possess firearms. And if he had managed to come into the possession of firearms illegally, most likely he would not have been such a good shot, because he would not have been able to practice the use of firearms, because people would have been aware that he had no right to possess or transport them.
>
> * * * * *

[11] The legislative history does not support petitioner's contention (Pet. Br. 12) that Senator Long and Congress focused on "the prevention of the *acquisition* of weapons by convicted felons * * *" (emphasis supplied). The primary concern with possession is reflected in virtually every sentence in the legislative history.

> It seems to me that this simply strikes at the possession of firearms by the wrong kind of people. It avoids the problem of imposing on an honest hardware store owner the burden of keeping a lot of records and trying to keep up with the ultimate disposition of weapons sold. It places the burden and the punishment on the kind of people who have no business possessing firearms in the event they come into possession of them.

That the legislation was not intended to be limited to the mere regulation of the possession of firearms that were moving in interstate commerce is shown by Senator Long's reliance, in supporting the constitutionality of Title VII, on this Court's decisions recognizing the broad reach of the Civil Rights Act of 1964 (see *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, and *Katzenbach* v. *McClung, supra*) (114 Cong. Rec. 13868 (1968)):

> For example, there was much debate and discussion about the constitutionality of the Civil Rights Act of 1964, but many of the items and transactions reached by the broad swath of the Civil Rights Act of 1964 were reached by virtue of the power of Congress to regulate matters affecting commerce, not just to regulate interstate commerce itself. * * * So if you want to do something about this matter, the present state of the law, as interpreted by the Supreme Court, would clearly permit you to reach either the possession or the transportation of weapons, in that this could affect commerce.

In a colloquy with Senator McClellan, Senator Long again made it clear that Title VII applied to possessions of firearms not moving in interstate commerce at the time of the possession (114 Cong. Rec. 14744 (1968)):

> Mr. McClellan. I have not had an opportunity to study the amendment. * * * The thought that occurred to me, as the Senator explained it, is that if a man had been in the penitentiary, had been a felon, and had been pardoned, without any condition in his pardon to which the able Senator referred, granting him the right to bear arms, could that man own a shotgun for purposes of hunting.
>
> Mr. Long of Louisiana. No, he could not. He could own it, but he could not possess it.
>
> Mr. McClellan. I beg the Senator's pardon?
>
> Mr. Long of Louisiana. This amendment does not seek to do anything about who owns a firearm. He could not carry it around; he could not have it.
>
> Mr. McClellan. Could he have it in his home?
>
> Mr. Long of Louisiana. No, he could not.

Prior to the Senate's passage of the Act, Senator Long summed up the purpose of Title VII (114 Cong. Rec. 14773–14775 (1968)):

> What the amendment seeks to do is to make it unlawful for a firearm * * * to be in the possession of a convicted felon * * *.
>
> * * * * *
>
> This amendment would proceed on the theory that every burglar, thief, assassin, and murderer is entitled to carry a gun until the com-

> mission of his first felony; but, having done that, he is then subject to being denied the right to use those weapons again.

These views were echoed in more general terms in the House by Congressman Machen (114 Cong. Rec. 16286 (1968)) [12]:

> Title VII prohibits the unlawful possession or receipt of firearms by felons, veterans who have been other than honorably discharged, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship. I believe this provision is necessary to a coordinated attack on crime and also a good complement to the gun-control legislation contained in title IV of this bill.

Finally, there is no indication in the legislative history that Congress in Title VII intended to proscribe only possession by felons of firearms where the possession was part of the interstate movement.

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[12] Congressman Pollock's remarks further support the construction that we urge. He said (114 Cong. Rec. 16298 (1968)): "This section makes it a Federal crime to take, possess, or receive a firearm across State lines when the person involved: First, has been convicted of a crime punishable by imprisonment for a term exceeding 1 year; * * *. The overall thrust is to prohibit possession of firearms by criminals or other persons who have specific records or characteristics which raise serious doubt as to their probable use of firearms in a lawful manner. I agree with this provision and feel this title alone provides the gun legislation portion necessary under this bill, without need for enactment of title IV." This statement that the "overall thrust is to prohibit possession," coupled with the statement that the statute makes it a crime to possess or receive a firearm across state lines, fairly may be read to proscribe possession by a felon of a firearm that has crossed state lines in the past. It draws no distinction between receipt and possession with respect to the necessary nexus with commerce.

C. *UNITED STATES* v. *BASS*, 404 U.S. 336, DOES NOT PRECLUDE CONSTRUING SECTION 1202(a)(1) AS COVERING POSSESSION OF A FIREARM THAT HAS MOVED IN COMMERCE

In *United States* v. *Bass*, 404 U.S. 336, the defendant was convicted of possessing firearms in violation of Section 1202(a)(1). The proof showed only that the defendant was a convicted felon who possessed firearms; "[t]here was no allegation in the indictment and no attempt by the prosecution to show that either firearm had been possessed 'in commerce or affecting commerce.'" 404 U.S. at 338. This Court held that the words "in commerce or affecting commerce" modified not only "transports" but also "receives" and "possesses," and that Bass's conviction could not stand "because the Government has failed to show the requisite nexus with interstate commerce" (404 U.S. at 347). The Court then made the following statement (404 U.S. at 350, footnote omitted):

> Having concluded that the commerce requirement in § 1202(a) must be read as part of the "possesses" and "receives" offenses, we add a final word about the nexus with interstate commerce that must be shown in individual cases. The Government can obviously meet its burden in a variety of ways. We note only some of these. For example, a person "possesses * * * in commerce or affecting commerce" if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce. Significantly broader in reach, however, is the offense of "receiv[ing] * * * in commerce or affecting commerce," for we conclude that the Government meets its burden here if it demonstrates

that the firearm received has previously traveled in interstate commerce.

Petitioner interprets this statement as establishing that the prior movement of a firearm in commerce is not sufficient to establish the offense of possession under Section 1202(a)(1).[13] The statement, however, does not sustain the gloss petitioner would place upon

[13] Since *Bass*, the courts of appeals have divided over the quantum of interstate connection required in a prosecution for possession under Section 1202(a). In addition to the court of appeals in this case, the Sixth Circuit and the Tenth Circuit have concluded that proof of previous interstate movement of the firearm provides a sufficient commerce nexus. *United States* v. *Jones*, 533 F. 2d 1387 (C.A. 6); *United States* v. *Bumphus*, 508 F. 2d 1405 (C.A. 10) (dictum); *United States* v. *Bush*, 500 F. 2d 19 (C.A. 6); *United States* v. *Mullins*, 476 F. 2d 664 (C.A. 4); *United States* v. *Brown*, 472 F. 2d 1181 (C.A. 6). Conversely, three other circuits have indicated that while a demonstration that the firearm has previously traveled in interstate commerce will suffice for the receipt offense in Section 1202(a), the possession offense requires proof that the possession was in fact contemporaneous with an interstate movement. *United States* v. *Ressler*, 536 F. 2d 208 (C.A. 7); *United States* v. *Bell*, 524 F. 2d 202 (C.A. 2); *United States* v. *Steeves*, 525 F. 2d 33 (C.A. 8) (dictum); *United States* v. *Kelly*, 519 F. 2d 251 (C.A. 8) (dictum). An apparent intra-circuit conflict exists within the Ninth Circuit on the issue. Compare *United States* v. *Burns*, 529 F. 2d 114 (C.A. 9), with *United States* v. *Malone*, 538 F. 2d 250 (C.A. 9), and *United States* v. *Cassity*, 509 F. 2d 682 (C.A. 9).

Even the courts that have adopted petitioner's construction of Section 1202(a) have permitted the jury to draw broad inferences of receipt from the fact of possession. For example, in *United States* v. *Lathan*, 531 F.2d 955 (C.A. 9), the court upheld a conviction for receipt solely on the basis of evidence that the firearm had been manufactured outside of California, transported to California in 1962 and found in 1974 in the possession of a defendant who had been convicted in 1971. See, also, *United States* v. *Giannoni*, 472 F.2d 136 (C.A. 9), certiorari denied, 411 U.S. 935.

it, and it cannot fairly be read as disposing of this case. As the court of appeals noted here (Pet. App. 4a; 539 F. 2d at 333):

> [T]he Court in *Bass* was not * * * fixing precise criteria for establishing the degree of proof of interstate commerce movement required under the statute for the offenses of *receipt* and *possession*. This is plain from the language of the Court to the effect that "[t]he Government can obviously meet its burden [of proving a commerce nexus] in a variety of ways" under the statute and observed that it was noting "only some of these."

The Court's statement in *Bass* that the offense of receiving a firearm "in commerce or affecting commerce" could be established by showing that the firearm had previously traveled in interstate commerce does not preclude the conclusion that the offense of possessing a firearm "in commerce or affecting commerce" can be established by the same showing. Indeed, the Court recognized that the government could meet its burden of proof of an interstate nexus "in a variety of ways," one of which was that "the possession affects commerce"—a statement which the Court did not further define. To the extent that the Court's observations in *Bass* suggest that the offense of possession requires something more than proof that the firearm previously traveled in interstate commerce, that dictum should not control the present case, where "the very point [merely touched on in *Bass*] is presented for decision" (*Cohens* v. *Virginia*, 6 Wheat. 264, 399).

In *Barrett* v. *United States*, 423 U.S. 212, the Court refused to follow dicta in *Bass* (404 U.S. at 342–343) suggesting that Title IV of the Act does not cover intrastate transactions. In rejecting those dicta and holding the Act applicable to the intrastate transfer of firearms that was unrelated to their prior interstate movement, the Court pointed out (423 U.S. at 222–223) that the question was not before the Court in *Bass* and that the issue of the reach of Title IV was now "at hand with the benefit of full briefing and an awareness of the plain language of § 922(h), of the statute's position in the structure of the entire Act, and of the legislative aims and purpose." Similarly, the question of the nexus with interstate commerce necessary for the offense of possession under Section 1202(a) is before the Court, and should not be foreclosed by general statements in a case where the issue was not presented.

Petitioner further contends (Br. 15–24) that the considerations of federalism upon which *Bass* rested in part support his restrictive interpretation of the commerce requirement of Section 1202(a). *Bass* held only that in Section 1202 Congress had not manifested the intent "to effect a significant change in the sensitive relation between federal and state criminal jurisdiction" (404 U.S. at 349) that would result from construing the section as dispensing with proof of any interstate nexus at all. It pointed out (*id.* at 350, emphasis added) that "[a]bsent proof of *some* interstate commerce nexus in each case, § 1202(a) dramatically intrudes upon traditional state crime jurisdiction."

Nothing in *Bass*, however, suggests that the "federal-state balance" (*id.* at 349) would be impermissibly disrupted by holding that the necessary interstate nexus for the possession offense is established by proof that the firearm previously moved in interstate commerce. The Court indicated in *Bass* (*id.* at 350) that the government could prove the offense of receipt by demonstrating that "the firearm received has previously traveled in interstate commerce." The application of the same standard of proof to the possession offense would produce no greater upsetting of the traditional federal-state balance in criminal law than its application to the receipt offense sanctioned in *Bass*. Similarly, in *Barrett, supra*, the Court upheld the application of Title IV of the Act to a local firearm transaction that traditionally would be the subject of state criminal prosecution.

In view of the language of the statute and the purpose of Congress, there is no occasion here to apply the rule of lenity which petitioner invokes (Pet. Br. 12–13) to narrow the scope of the possession offense. Although penal laws are to be construed strictly, they "ought not to be construed so strictly as to defeat the obvious intention of the legislature." *American Fur Co.* v. *United States*, 2 Pet. 358, 367; *United States* v. *Bass, supra*, 404 U.S. at 351; *Huddleston* v. *United States*, 415 U.S. 814, 831.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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